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THE LAW OF DOMICIL

AS A

BRANCH OF THE LAW OF ENGLAND;

STATED IN THE FORM OF RULES.

BY

A. V. DICEY, B.C.L.,

BARRISTER-AT-LAW, AND FORMERLY FELLOW OF TRINITY COLLEGE, OXFORD;
ONE OF THE JUNIOR COUNSEL TO THE INLAND REVENUE;

AUTHOR OF

"RULES FOR THE SELECTION OF PARTIES TO AN ACTION."

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P R E F A C E.

THE subject of this treatise is the Law of Domicil. The book differs from most works on domicil in its scope, in the point of view from which its subject is treated, and in form. Some prefatory explanation therefore as regards each of these points may not be out of place.

Under the law of England a person's rights, and the legal effect of his acts are, in some cases, determined by reference to the law of the country where he has his home, or, in legal language, his domicil, which country is not necessarily the country where he is actually residing, or of which he is a citizen. This treatise, therefore, deals with three topics—the nature of domicil, the ascertainment of domicil (or the rules of evidence by which to determine whether a man is domiciled in one country rather than in another), and the legal effects of domicil. Thus it includes more than would be naturally contained in a mere essay on the nature of domicil, and covers about two-thirds of the subjects included in Story's *Conflict of Laws* or Westlake's *Private International Law*.

The law of domicil is often looked at as a branch of the subject called by an unfortunate misnomer Private International Law. In this treatise, however, it is considered solely as a part of the law of England. No attempt is made to determine whether the rules which make up the law of domicil, as administered by English Courts, are or are not the same as

the rules administered by foreign tribunals, and forming, therefore, part of various foreign legal systems. The treatment here adopted has two advantages. It is, in the first place, convenient for English practitioners, who are in general only concerned to determine what on a given point is the law of England. In the second place, it is correct in point of theory, for it rests on the broad distinction between rules which are strictly laws, as being part of the municipal law of one particular country (our own), and rules prevailing in other countries, which are not laws to us at all, since they do not rest on the authority of our own State; and it completely avoids the errors which have arisen from confusing the rules of so-called Private International Law, which are in strictness "laws" but are not "international," with the principles of international law properly so called, which are "international" since they regulate the conduct of nations towards each other, but are not in the strict sense of the term "laws." The fact that the law of domicil is here treated as a branch of English law should be noted. Foreign authorities, such as Story, Savigny, Foelix, &c., and the judgments of foreign tribunals, are indeed cited; but this is done simply because, in this department of law, the decisions of our courts, or, in other words, the law of England, will be found, in fact, to be influenced by the theories of eminent jurists, as also by the practice of foreign courts.

This treatise has further some peculiarities of form. The law of domicil is therein reduced into a series of definite rules, which being based on statutory enactments, decided cases, or inferences drawn from authoritative dicta or admitted principles, constitute, in so far as my work has been successfully performed, a code of what may be termed the English law of domicil. These rules form the backbone of the whole treatise. They are first stated apart from any comment, and then, in the body of the work, each of them is repeated and made the subject

of separate comment or explanation. The object of such explanatory comment is to elucidate the meaning of any rule requiring explanation, to state the grounds on which it rests, to call attention to the doubts which in some cases may fairly be entertained as to its correctness, and to raise, and if possible solve, doubtful questions which a rule sometimes suggests. Such a course of critical examination leads at times to the negative result that on particular points the law is so unsettled that no rule can be stated which ought to be considered as more than a conjectural inference from established principles; and I have, therefore, when a rule seemed doubtful, indicated the uncertainty by a printed query. I have, in short, applied to the law of domicile the method of stating the law which nine years ago I employed in my *Treatise on Parties to an Action*. The approval which, as I have reason to believe, my attempt to digest the law of parties to actions into a series of rules has received from competent judges, as well as the appearance since 1870 of numerous works based on the principle that a mass of law can best be exhibited in the form of systematic rules, has strengthened my conviction that the method I then adopted is sound, and has encouraged the hope that I may, by applying the same method to the law of domicile, at once codify and explain a branch of English law which specially needs systematic treatment. How far my attempt is successful must be left to the judgment of my readers. I may at least venture to assert that I have in no instance laid down any rule without careful consideration, and that whilst I have myself consulted the authorities for every important statement throughout this treatise, I have studied every recent work likely to throw light on my subject, except Mr. Foote's *Private International Jurisprudence*, which did not come into my hands till my book was fully prepared for the printer.

Of the debt I owe to Savigny, Story, Phillimore and West-

lake, I say the less because my obligations are patent on the face of my work. The frequent references to the writings of these and of other authors may, while they testify to the extent of my obligations, serve as a guide to the sources best worth consulting on each point dealt with in this treatise. It is at once a duty and a pleasure to express my sense of the invaluable aid which throughout the composition of this work I have received from the corrections, criticisms, and suggestions of the legal friends who have taken an interest in its progress.

A. V. DICEY.

TEMPLE, *June*, 1879.

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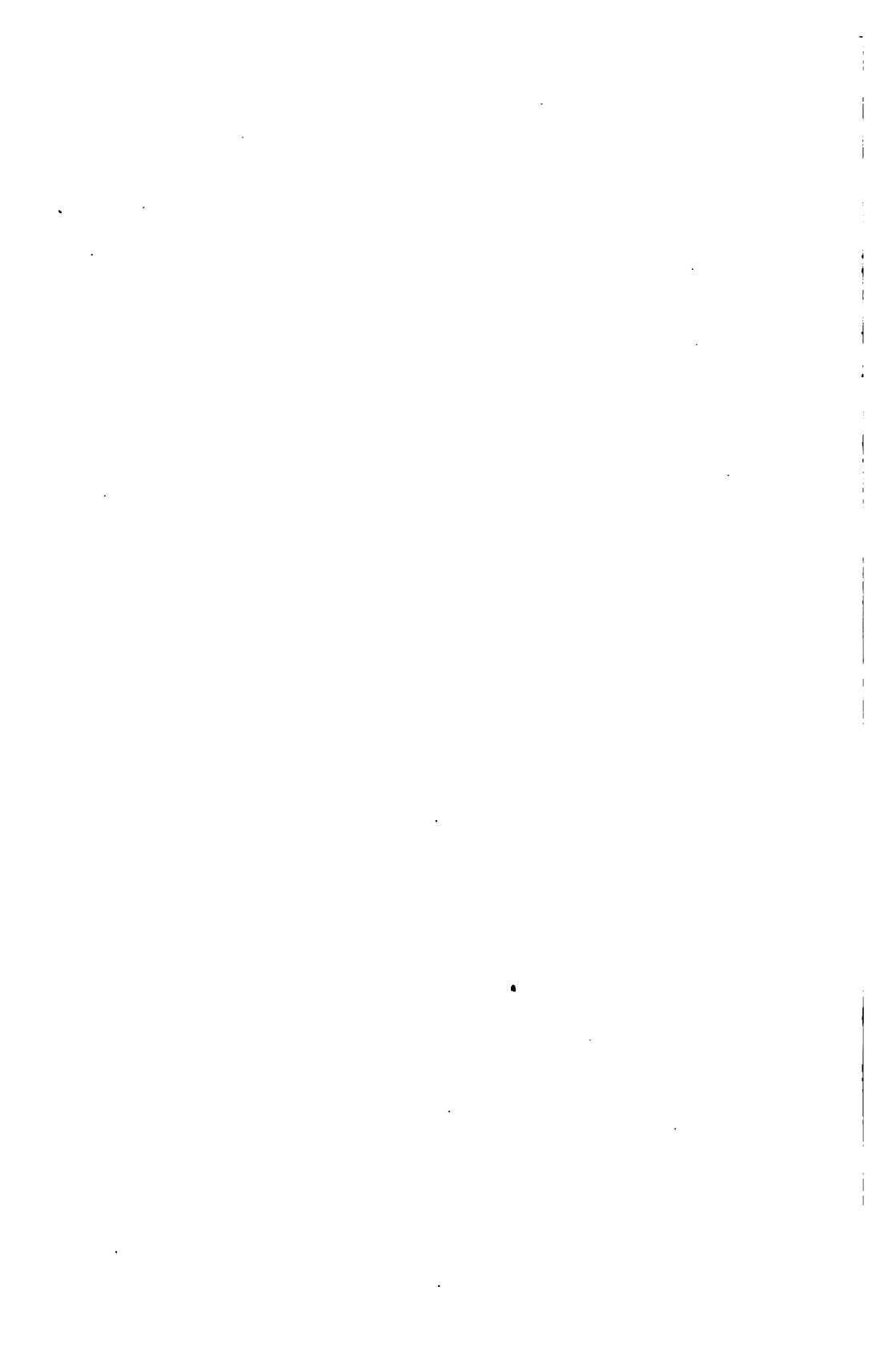
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THE LAW OF DOMICIL.

INTERPRETATION OF TERMS.

IN the following rules and exceptions the following terms have the following meanings :

(1) "Domicil" means the place or country which is considered by law to be a person's permanent home.

(2) "Country" means the whole of a territory subject to one system of law.

(3) "Foreign" means not English.

(4) "Foreign country" means any country except England.

(5) "United Kingdom" means the United Kingdom of England, Scotland, and Ireland.

(6) "British dominions" means all countries governed by the British Crown, including the United Kingdom.

(7) "Independent person" means a person who, as regards his domicil, is not legally dependent, or liable to be legally dependent, upon the will of another person.

8. "Dependent person" means a person who, as regards his domicile, is legally dependent, or liable to be legally dependent, upon the will of another person, and includes

- (i) an infant ;
- (ii) a married woman.

(9) "*Lex domicilii*, or law of a person's domicile," means the law of the country where a person is domiciled.

(10) "*Lex situs*" means the law of the country where a thing is situated.

(11) "An immoveable" means a thing which cannot be moved, and includes a chattel real.

(12) "A moveable" means a thing which is not an immoveable, and includes both a thing which can be moved and a thing which is the object of a claim, or in other words, a *chose in action*.

TABLE OF RULES.

PART I.

NATURE, ACQUISITION, AND CHANGE OF DOMICIL.

I. DOMICIL OF NATURAL PERSONS.

(i.) NATURE OF DOMICIL.

RULE 1.—The domicile of any person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law.

RULE 2.—No person can at any time be without a domicile.

RULE 3.—Subject to the exception hereinafter mentioned, no person can have at the same time more than one domicile (?)

Exception.—A person within the operation of 24 & 25 Vict. c. 121, may possibly have one domicile for the purpose of testate or intestate succession, and another domicile for all other purposes.

RULE 4.—A domicile once acquired is retained until it is changed

TABLE OF RULES.

- (1) in the case of an independent person, by his own act ;
 - (2) in the case of a dependent person, by the act of some one on whom he is dependent.
-

(ii.) ACQUISITION AND CHANGE OF DOMICIL.

A.—*Domicil of Independent Persons.*

RULE 5.—Every independent person has at any given moment either

- (1) the domicil received by him at (or as from) his birth (which domicil is hereinafter called the domicil of origin), or,
- (2) a domicil (not being the same as his domicil of origin) acquired by him while independent by his own act (which domicil is hereinafter called a domicil of choice).

Domicil of Origin.

RULE 6.—Every person receives at (or as from) birth a domicil of origin.

- (1) In the case of a legitimate infant born during his father's lifetime, the domicil of origin of the infant is the domicil of the father at the time of the infant's birth.

- (2) In the case of an illegitimate or posthumous infant, the domicil of origin is the domicil of his mother at the time of his birth.
- (3) In the case of a foundling, the domicil of origin is the country where he is born or found.
- (4) In the case of a legitimated person, the domicil of origin is the domicil which his father had at the time of such person's birth.

Domicil of Choice.

RULE 7.—Every independent person can acquire a domicil of choice, by the combination of residence (*factum*), and intention of permanent or indefinite residence (*animus manendi*), but not otherwise.

Change of Domicil.

RULE 8.

- (1) The domicil of origin is retained until a domicil of choice is in fact acquired.
- (2) A domicil of choice is retained until it is abandoned, whereupon either
 - (i) a new domicil of choice is acquired ; or
 - (ii) the domicil of origin is resumed.

B.—*Domicil of Dependent Persons (Infants,
Married Women).*

RULE 9.—The domicil of every dependent person is the same as, and changes (if at all) with, the

domicil of the person on whom he is, as regards his domicil, legally dependent.

SUB-RULE 1.—Subject to the exceptions herein-after mentioned, the domicil of an infant is during infancy determined as follows :

- (1) The domicil of a legitimate or legitimated infant is, during the lifetime of his father, the same as, and changes with, the domicil of his father.
- (2) The domicil of an illegitimate infant or of an infant whose father is dead, is, during the lifetime of the infant's mother, the same as, and changes with, the domicil of the mother.
- (3) The domicil of an infant without living parents, or of an illegitimate infant without a living mother, possibly is the same as, and changes with, the domicil of his guardian (?)

*Exception 1 to Sub-Rule :—*The domicil of an infant is not changed by the marriage of the infant's mother.

*Exception 2 to Sub-Rule :—*The change of an infant's home, by a mother or a guardian does not, if made with a fraudulent purpose, change the infant's domicil.

SUB-RULE 2.—The domicil of a married woman is during coverture the same as, and changes with, the domicil of her husband.

RULE 10.—A domicil cannot be acquired by a dependent person through his own act.

SUB-RULE.—Where there is no person capable of changing an infant's domicil, he retains, until the

termination of infancy, the last domicile which he has received.

RULE 11.—The last domicile which a person receives whilst he is a dependent person, continues, on his becoming an independent person, unchanged until it is changed by his own act.

SUB-RULE 1.—A person on attaining his majority retains the last domicile which he had during infancy until he changes it.

SUB-RULE 2.—A widow retains her late husband's last domicile until she changes it.

SUB-RULE 3.—A divorced woman retains the domicile which she had immediately before, or at the moment of, divorce until she changes it.

II. — DOMICIL OF LEGAL PERSONS OR CORPORATIONS.

RULE 12.—The domicile of a corporation is the place considered by law to be the centre of its affairs, which,

- (1) in the case of a trading corporation, is its principal place of business, *i.e.*, the place where the administrative business of the corporation is carried on,
- (2) in the case of any other corporation, is the place where its functions are discharged.

PART II.

ASCERTAINMENT OF DOMICIL.

I.—DOMICIL HOW ASCERTAINED.

RULE 13.—The domicile of a person can always be ascertained by means of either

- (1) a legal presumption ; or
 - (2) the known facts of the case.
-

II.—LEGAL PRESUMPTIONS.

RULE 14.—A person's presence in a country is presumptive evidence of domicile.

RULE 15.—When a person is known to have had a domicile in a given country he is presumed, in the absence of proof of a change, to retain such domicile.

III.—FACTS WHICH ARE EVIDENCE OF DOMICIL.

RULE 16.—Any circumstance may be proof or evidence of domicile, which is evidence either of a

person's residence (*factum*), or of his intention to reside permanently (*animus manendi*), within a particular country.

RULE 17.—Expressions of intention to reside permanently in a country are evidence of such an intention, and in so far evidence of domicil.

RULE 18.—Residence in a country is *prima facie* evidence of the intention to reside there permanently (*animus manendi*) and in so far evidence of domicil.

RULE 19.—Residence in a country is not even *prima facie* evidence of domicil, when the nature of the residence either is inconsistent with, or rebuts the presumption of, the existence of an intention to reside there permanently (*animus manendi*).

PART III.

LEGAL EFFECTS OF DOMICIL.

I.—RIGHTS AFFECTED BY THE LAW OF DOMICIL.

RULE 20.—The law of domicile does not affect rights in respect of

- (1) immoveables ;
- (2) contracts (with the exception of marriage, and contracts having reference to marriage) ;
- (3) torts ;
- (4) procedure.

RULE 21.—The law of domicile affects rights in respect of

- (1) *status*, or personal capacity ;
- (2) marriage ;
- (3) divorce ;
- (4) moveables.

RULE 22.—The law of domicile affects the rights of the Crown to legacy duty, or to succession duty, in respect of a deceased person's moveables.

II.—STATUS OR PERSONAL CAPACITY GENERALLY.

RULE 23.—Any *status* existing under the law of a person's domicile is recognised as regards all transactions taking place wholly within the country where he is domiciled.

RULE 24.—Transactions taking place in England are not affected by any *status* existing under foreign law, which either

- (1) is of a kind unknown to English law ; or
- (2) is penal.

RULE 25.—In cases which do not fall within Rule 24, the existence of a *status* existing under the law of a person's domicile, is recognised by English courts, but such recognition does not necessarily involve the giving of effect to the results of such *status*.

III.—PARTICULAR KINDS OF STATUS.

A.—*Parent and Child.*

RULE 26.—The power of a parent, whether English or foreign, over the person of his child while in England, is not affected by the law of the parent's foreign domicile.

RULE 27.—The rights of a parent domiciled in a foreign country, over the moveables in England belonging to an infant are, perhaps, governed by

the law of the parent's domicile, but are more probably governed while the infant is in England, by the ordinary rules of English law.

B.—Guardian and Ward.

RULE 28.—A guardian appointed under the law of a foreign country (called hereinafter a foreign guardian) has no direct authority as guardian in England; but the English courts recognise the existence of a foreign guardianship, and will, in their discretion, give effect to a foreign guardian's authority over his ward.

RULE 29.—A foreign guardian has, unless interfered with by the courts, control over the person of his ward whilst in England.

RULE 30.—A foreign guardian cannot interfere with moveables situated in England belonging to his ward (?)

C.—Infancy.

RULE 31.—An infant's capacity to bind himself by a contract depends upon the law of the country where the contract is made (?)

RULE 32.—The capacity of any person for the alienation of moveables depends (so far as the question of infancy or majority is concerned) on the law of that person's domicile.

RULE 33.—An infant's testamentary capacity in respect of moveables depends on the law of the infant's domicile.

D.—*Legitimacy.*

RULE 34.—A child born anywhere in lawful wedlock is legitimate.

RULE 35.—The law of the father's domicile at the time of the birth of a child born out of lawful wedlock determines whether the child becomes, or may become, legitimate in consequence of the subsequent marriage of the parents (*legitimatio per subsequens matrimonium*).

Case i.—If the law of the father's domicile at the time of the birth of the child allows of *legitimatio per subsequens matrimonium*, the child becomes, or may become, legitimate on the marriage of the parents.

Case ii.—If the law of the father's domicile at the time of the birth of the child does not allow of *legitimatio per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents.

But a person born out of lawful wedlock cannot be heir to English real estate, nor can anyone, except his issue, inherit English real estate from him.

E.—*Husband and Wife.*

RULE 36.—The power of a husband, whether English or foreign, over the person of his wife while in England, is not affected by the law of his foreign domicile.

RULE 37.—A married woman's capacity to contract depends on the law of the country where the contract is made (?)

RULE 38.—A married woman's capacity for the alienation of moveables depends in general upon the law of her domicile.

RULE 39.—A married woman's testamentary capacity as to moveables depends on the law of her domicile.

— F.—*Lunatic and Curator, or Committee.*

RULE 40.—A foreign decree or commission appointing a person curator or committee of a lunatic resident in a foreign country does not of itself empower the curator or committee to deal with the person or property of the lunatic in England.

RULE 41.—If a curator or committee duly appointed under a foreign decree applies to the court for the payment to him of money belonging to the lunatic, the court may in its discretion grant or refuse the application.

G.—*Corporations.*

RULE 42.—The existence of a foreign corporation duly created under the law of a foreign country is recognised by our courts

RULE 43.—The capacity of a corporation to enter into legal transactions depends both on the constitution of the corporation, and on the law of the country where the transactions occur.

IV.—MARRIAGE.

RULE 44.—Subject to the exceptions hereinafter mentioned, a marriage is valid when

- (1) each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other ; *and*
- (2) any one of the following conditions as to the form of celebration is complied with (that is to say):
 - (i) if the marriage is celebrated in accordance with any form recognised as valid by the law of the country where the marriage is celebrated (called hereinafter the local form) ; *or*
 - (ii) if the parties enjoy the privilege of ex-territoriality, and the marriage is celebrated in accordance with any form recognised as valid by the law of the State to which they belong ; *or*
 - (iii) if the marriage (being between British subjects ?) is celebrated in accordance with the requirements of the English Common Law in a country where the use of the local form is impossible ; *or*
 - (iv) if the marriage is celebrated in a country not being part of the British dominions, in accordance with the provisions of, and the forms required by, 4 Geo. 4, c. 91, 12 & 13 Vict. c. 68, or any other Statute applicable to the case.

In this Rule and the following Rules the term "marriage" means the voluntary union for life of one man and one woman to the exclusion of all others.

Exception 1.—A marriage is not valid which is incestuous by the laws of all Christian countries.

Exception 2.—A marriage is not valid if either of the parties being a descendant of George II., marries in contravention of the Royal Marriage Act, 12 Geo. 3, c. 11.

Exception 3.—A marriage is not valid if either of the parties is, according to the law of the country where the marriage is celebrated, under an incapacity to marry the other (?)

RULE 45.—Subject to the exception hereinafter mentioned, no marriage is valid which does not comply, both as to the capacity of the parties and the form of celebration, with Rule 44.

Exception.—A marriage celebrated in England is not invalid on account of any incapacity of either of the parties which, though imposed by the law of his or her domicile, is of a kind to which our courts refuse recognition.

V.—DIVORCE.

General Principle.

RULE 46.—Jurisdiction in matters of divorce depends, in general, upon the domicile of the parties to a marriage at the time of the commencement of proceedings for divorce. Hence, in general,

- (1) a Divorce Court of any country where such parties are then domiciled has jurisdiction to dissolve their marriage ;
- (2) no court of any other country has jurisdiction to dissolve their marriage.

A.—*English Divorces.*

SUB-RULE 1.—The English Divorce Court has jurisdiction to dissolve the marriage of any parties domiciled in England at the commencement of proceedings for divorce.

The jurisdiction of the court in respect of such parties is not affected by

- (1) the residence of the parties, or
- (2) the allegiance of the parties, or
- (3) the domicile of the parties at the time of the marriage, or
- (4) the place of the marriage, or
- (5) the place where the offence, in respect of which divorce is sought, was committed.

SUB-RULE 2.—Subject to the exceptions hereinafter mentioned, the English Divorce Court has no jurisdiction to dissolve the marriage of any parties not domiciled in England at the commencement of proceedings for divorce (?).

Exception 1 to Sub-Rule.—The Divorce Court has under exceptional circumstances jurisdiction to dissolve a marriage where the parties are (or possibly where one of them is), at the commencement of proceedings for divorce, resident though not domiciled in England.

Exception 2 to Sub-Rule.—The Divorce Court has jurisdiction to dissolve a marriage between parties not domiciled in England at the time of the proceedings for divorce where the defendant has appeared absolutely and not under protest.

Exception 3 to Sub-Rule.—The Divorce Court has jurisdiction to dissolve an English marriage between British subjects on the petition of a wife who is resident though not domiciled in England.

B.—*Foreign Divorces.*

SUB-RULE 3.—Subject to the exceptions hereinafter mentioned, the Divorce Court of a foreign country has jurisdiction to dissolve the marriage of any parties domiciled in such foreign country at the commencement of proceedings for divorce, and a divorce by such a court of such parties is valid.

This Sub-Rule applies to

- (1) an English marriage,
- (2) a foreign marriage.

Exception 1 to Sub-Rule.—A foreign divorce is not valid which is obtained by the collusion or fraud of the parties.

Exception 2 to Sub-Rule.—A foreign divorce is not valid if the proceedings are conducted in a way contrary to natural justice.

Exception 3 to Sub-Rule.—A foreign divorce of the parties to an English marriage, for a cause for which divorce could not be obtained in England, is not valid (?).

SUB-RULE 4.—Subject to the possible exception hereinafter mentioned, the Divorce Court of a foreign country has no jurisdiction to dissolve the marriage of parties not domiciled in such foreign country at the commencement of proceedings for divorce, and a divorce granted by such court to parties not then domiciled in such country is not valid.

Possible Exception to Sub-Rule.—The Divorce Court of a country where the parties to a marriage are not domiciled has jurisdiction to dissolve their marriage, if the divorce granted by such court would be held valid by the courts of the country where the parties are domiciled.

Effect of Divorce.

RULE 47.—The effects in England of a valid divorce granted by a foreign court are the same as the effects of a divorce granted by the English Divorce Court.

Decision on Validity of Marriage.

RULE 48.—The English Divorce Court has jurisdiction to enquire into the validity of any marriage celebrated in England.

VI.—GENERAL PRINCIPLES AS TO RIGHTS OVER
MOVEABLES.

RULE 49.—The law of the country where a thing is situated (*lex situs*) determines whether it is to be considered as a moveable or an immoveable.

RULE 50.—Rights over moveables are in many cases determined by the law of the owner's domicile (*lex domicilii*).

RULE 51.—Rights over individual moveables are determined by the law of the country where the moveable is situated (*lex situs*) at the time when the transaction takes place in which the right originates.

RULE 52.—A right to a moveable once duly acquired is not lost by a change in the situation of the moveable.

VII.—INDIVIDUAL ASSIGNMENT OF MOVEABLES.

RULE 53.—An assignment of a moveable in accordance both with the law of the owner's domicil (*lex domicilii*) and with the law of the country where the moveable is situated (*lex situs*) is valid.

RULE 54.—Subject to the exception hereinafter mentioned and to the effect of Rule 57, the assignment of a moveable, wherever situated, in accordance with the law of the owner's domicil is valid.

Exception.—When the law of the country where a moveable is situated (*lex situs*) prescribes a special form of transfer, an assignment according to the law of the owner's domicil (*lex domicilii*) is not valid.

RULE 55.—An assignment of a moveable giving a good title according to the law of the country where the moveable is situated (*lex situs*) at the time of the assignment is valid.

RULE 56.—Subject to the exception hereinafter mentioned, a judgment *in rem* in respect of the title to a moveable by a foreign court of competent jurisdiction having power to deal with the moveable, gives a valid title to the moveable.

Exception.—Where the court delivering the judgment wilfully refuses to recognise the law of other nations, the title given by the judgment is not valid (?).

RULE 57.—Where there is a conflict between a title under the law of the country where a moveable is situated (*lex situs*) and under the law of the owner's domicil (*lex domicilii*), the *lex situs* will in

general prevail, *i.e.*, the title under the *lex situs* will be held the better.

RULE 58.—The assignment of a debt is regulated by the law of the creditor's domicil (*lex domicilii*) (?).

VIII.—GENERAL ASSIGNMENTS OF MOVEABLES.

General Principle.

RULE 59.—The assignment of a person's moveables (as a whole) in consequence of

- (1) marriage, or
- (2) bankruptcy, or
- (3) death

is (in general) regulated by the law of such person's domicil at the moment of the transaction or event causing the assignment.

IX.—ASSIGNMENT OF MOVEABLES BY MARRIAGE.

RULE 60.—Where there is no marriage contract, or settlement, the mutual rights of husband and wife to each other's moveables, whether possessed at the time of the marriage or acquired afterwards, are (subject to the possible exception hereinafter mentioned) determined by the law of the husband's actual (or intended?) domicil at the time of the marriage without reference to the law of the country

- (1) where the marriage is celebrated, or
- (2) where the wife is domiciled before marriage.

Exception.—Where the domicil of the parties is changed after marriage, the mutual rights of husband and wife over each other's subsequently acquired moveables are governed by the law of their domicil at the time of the acquisition (?).

RULE 61.—Where there is a marriage contract, or settlement, the terms of the contract, or settlement, determine the rights of husband and wife in respect of all present or future moveables to which it applies.

SUB-RULE 1.—A marriage contract, or settlement, will, in the absence of reason to the contrary, be construed with reference to the law of the husband's actual (or intended?) domicil at the time of the marriage.

SUB-RULE 2.—The parties may make it part of the contract, or settlement, that their rights shall be subject to some other law than the law of the husband's domicil, in which case their rights will be determined with reference to such other law.

SUB-RULE 3.—The law of the husband's actual (or intended?) domicil at the time of the marriage will, in general, decide whether particular property (*e.g.*, any future acquisition) is included within the terms of the marriage contract, or settlement.

SUB-RULE 4.—The effect and construction of

the marriage contract, or settlement, is not varied by a subsequent change of domicil.

RULE 62.—The mutual rights of husband and wife in respect of succession to moveables on the death of the other are governed by the law of the deceased's domicil at the time of his or her death.

X.—ASSIGNMENT OF MOVEABLES UNDER BANKRUPTCY.

RULE 63.—A bankruptcy in the country where the bankrupt is domiciled is, in so far as under the law of that country it involves an assignment of the bankrupt's property, an assignment of all the bankrupt's moveables, wherever situated, to the representative of his creditors.

SUB-RULE 1.—A bankruptcy in any foreign country is an assignment to the representative of the creditors of all the bankrupt's moveables situated in England and of all debts due to him in England.

SUB-RULE 2.—A bankruptcy in England is an assignment to the trustee in bankruptcy of all the bankrupt's moveables situated, and of all the debts due to the bankrupt, in any part of the British dominions.

SUB-RULE 3.—A bankruptcy in England ought, according to the view of our courts, to be an assignment to the trustee in bankruptcy of all the bankrupt's moveables situated, and of all the

debts due to the bankrupt, in any country not forming part of the British dominions.

RULE 64.—The effect of a bankruptcy in a country where the bankrupt is not domiciled is, as regards his moveables, as follows :

(1) If the bankruptcy takes place in any part of the United Kingdom

(i) the bankruptcy has the same effect throughout the British dominions as it would have had if the bankrupt had been domiciled in the United Kingdom, *i.e.*, it is an assignment to the representative of the creditors of all the bankrupt's moveables situated, and of all the debts due to him, in any part of the British dominions ;

(ii) the bankruptcy is not an assignment of any moveables of the bankrupt's situated, or of any debts due to the bankrupt, in any country not forming part of the British dominions.

(2) If the bankruptcy takes place in any country not part of the United Kingdom, the bankruptcy has in England the same effect as it would have if the bankrupt were domiciled in such country (?).

RULE 65.—Where there are several bankruptcies in different countries effect will be given, as an assignment of the bankrupt's moveables, to that bankruptcy which is earliest in date (?).

XI.—ASSIGNMENT OF MOVEABLES BY DEATH.

A.—*Intestate Succession.*

RULE 66.—The distribution of and succession to the moveables of an intestate is regulated by the law of his domicile at the time of his death, without any reference to the law of

- (1) the place of his birth, or
- (2) the place of his death, or
- (3) the place of his domicile of origin, or
- (4) the place where the moveables are, in fact, situated.

RULE 67.—Subject to the exception hereinafter mentioned, the law of a deceased person's domicile at the time of his death determines whether he does or does not die intestate.

Exception.—A person may, under 24 & 25 Vict. c. 114, not die intestate as to moveables within the British dominions, though held to be intestate by the law of the country where he dies domiciled.

B.—*Testamentary Succession.*(i) *Validity of Will.*

RULE 68.—Any will of moveables which is valid according to the law of the testator's domicile at the time of his death is valid.*

* Rules 68—70 deal with cases where there has been no change of the testator's domicile between the execution of the will and his death.

(ii) Invalidity of Will.

RULE 69.—Any will of moveables which is invalid according to the law of the testator's domicile at the time of his death on account of

- (1) the testamentary incapacity of the testator, or
- (2) the formal invalidity of the will (*i.e.*, the want of the formalities required by such law) or
- (3) the material invalidity of the will (*i.e.* on account of its provisions being contrary to such law) ;

is (subject to the exceptions hereinafter mentioned) invalid.

Exception 1.—Every will and other testamentary instrument made out of the United Kingdom by a British subject shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if made according to the forms required

- (1) by the law of the place where the same was made ; or
- (2) by the laws then in force in that part (if any) of the British dominions where the testator had his domicile of origin.

Exception 2.—Every will and other testamentary instrument made within the United Kingdom by any British subject shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

(iii) Interpretation of Will.

RULE 70.—Subject to the exception hereinafter mentioned, a will of moveables is, in general, to be interpreted with reference to the law of the testator's domicile.

Exception.—When a will is expressed in the technical terms of the law of a country where the testator is not domiciled the will should be construed with reference to the law of that country.

(iv.)—Effect of Change of Testator's Domicil after Execution of Will.

RULE 71.—Subject to the possible exception hereinafter mentioned, no will or other testamentary instrument shall be held to have been revoked or to have become invalid, nor shall the construction thereof be altered by reason of any subsequent change of domicil of the person making the same.

Exception.—A will which is invalid on account of material invalidity according to the law of the testator's domicil at the time of his death is invalid, although it may have been valid according to the law of the testator's domicil at the time of its execution (†).

C.—Administration.

RULE 72.—The administration of the moveables of an intestate or testator is governed by the law of the country where the moveables are in fact situated (*lex situs*) and not by the law of the deceased person's domicil.

XII.—LEGACY AND SUCCESSION DUTY.

RULE 73.—The right of the Crown to legacy duty or to succession duty in respect of a deceased person's moveables, wherever actually situated, depends, in general, upon the domicile of the deceased person at the time of his death.

SUB-RULE 1.—Moveables, wherever actually situated, which belong to a person dying domiciled in the United Kingdom, are (if otherwise chargeable) liable to legacy duty.

SUB-RULE 2.—Moveables, wherever actually situated, which belong to a person dying domiciled out of the United Kingdom, are not liable to legacy duty.

SUB-RULE 3.—Moveables, wherever actually situated, which belong to a person dying domiciled in the United Kingdom, are (if otherwise chargeable) liable to succession duty.

SUB-RULE 4.—Subject to the exception hereinafter mentioned, moveables, wherever actually situated, which belong to a person dying domiciled out of the United Kingdom, are not liable to succession duty.

Exception to Sub-Rule.—The moveables of a person dying domiciled out of the United Kingdom are liable to succession duty if the successor claims them by virtue of an English, Scotch, or Irish trust or settlement, and therefore under English, &c., law.

INTRODUCTION.



INTERPRETATION OF TERMS.

In the following rules and exceptions the following terms have the following meanings :

- (1) "Domicil" means the place or country ^{Domicil.} which is considered by law to be a person's permanent home.
- (2) "Country" means the whole of a territory ^{Country.} subject to one system of law.
- (3) "Foreign" means not English. ^{Foreign.}
- (4) "Foreign country" means any country ^{Foreign} except England. ^{country.}
- (5) "United Kingdom" means the United ^{United} Kingdom of England, Scotland, and ^{Kingdom.} Ireland.
- (6) "British dominions" means all countries ^{British} governed by the British Crown, in- ^{dominions.}cluding the United Kingdom.
- (7) "Independent person" means a person ^{Independ-} who, as regards his domicil, is not ^{ent person.} legally dependent, or liable to be legally dependent, upon the will of another person.

Dependent
person.

- (8) "Dependent person" means a person who, as regards his domicile, is legally dependent, or liable to be legally dependent, upon the will of another person, and includes

- (i) an infant ;
- (ii) a married woman.

*Lex
domicilii.*

- (9) "*Lex domicilii*," or law of a person's domicile," means the law of the country where a person is domiciled.

*Lex
situs.*

- (10) "*Lex situs*" means the law of the country where a thing is situated.

Im-
moveable.

- (11) "An immoveable" means a thing which cannot be moved, and includes a chattel real.

Move-
ables.

- (12) "A moveable" means a thing which is not an immoveable, and includes both a thing which can be moved and a thing which is the object of a claim, or in other words, a *chose in action*.

(1) *Domicil.*

A person's domicile is the place or country which is considered by law to be his permanent home (a).

This merely verbal definition of the term domicile applies to all cases in which the term is used. Whenever a person of any description is said to be domiciled or to have his domicile in a particular place, *e.g.*, France, the least which is meant is that he is considered by the courts to have his permanent home in France, and will be treated by them as being settled in France, or in other words

(a) See *Whicker v. Hume*, 28 L. J. (Ch.) 396, 400 ; *Att.-Gen. v. Rowe*, 31 L. J. (Ex.) 314, 320.

that France is considered by the courts to be his permanent home.

The words "considered by law" are important, and point to the fact that a person's domicile need not necessarily be his actual home; or, to put the same thing in another form, that the existence of a domicile is not a mere question of fact, but an inference of law drawn from the facts whatever they may be, from which the courts infer that a person has a domicile in a particular country.

This very general definition applies further to the domicile of both the classes of persons known to the law (that is to say):

- (1) Natural persons (or human beings).
- (2) Legal persons (or corporations).

Any more specific, and therefore narrower, definition of the term would not cover the domicile both of human beings and of corporations. For further information as to the nature and meaning of domicile, the reader is referred to the rules explaining its meaning or nature, with reference, first, to natural persons (*c*); secondly, to corporations (*d*).

(2) *Country.*

The word country has among its numerous significations (*e*) the two following meanings, which require to be carefully distinguished from one another.

(*c*) See Rule 1, p. 42, *post*.

(*d*) See Rule 12, p. 110, *post*.

(*e*) It means, for example (in its geographical sense), "a geographical district making up a separate part of the physical world," as in the expression, a newly discovered country. It means again (in what may be termed its historical sense), "a land inhabited, or supposed to be inhabited, by one race or people," as, for instance, Italy, before the Italians were united under one Government. Neither the geographical nor the historical sense of the word, directly concern writers on law, but the geographical sense is worth notice, as putting a limit in ordinary language, to the use of the word in its political and legal senses. There is an awkwardness, though one which cannot be avoided, in calling the whole British Empire, one "country," in

- (i) A country, in what may be called the political sense of the word, means "the whole of the district or territory, subject to one sovereign power" (*f*), such as France, Italy, the United States, or the British Empire.

A country in this sense is sometimes called a "realm," with reference to the sovereign and his authority over the territory and over his subjects therein. It is sometimes termed a state, in one of the many meanings of that word, when considered in reference to the citizens and their allegiance to the sovereign, who has authority over the territory.

The word country is not in the following rules used in its political sense of a realm or state.

- (ii) A country, in what may be called the legal sense of the word, means "a district or territory, which (whether it constitutes the whole or a part only of the territory subject to one sovereign), is the whole of a territory subject to one system of law;" such for example as England, Scotland, or Ireland, or as each of the States which collectively make up the United States.

For the term country, in the legal sense of the word, there is no satisfactory English substitute. If the use of a new term be allowable, a country might in this sense, (on the analogy of the Latin *territorium legis* and the German *Rechtsgebiet*) be called a "law district," and this expression is occasionally used in this treatise.

The term country is, throughout these rules, and generally (though not invariably) in the body of the work, used in its legal sense of law district.

the political sense of the term. The awkwardness arises from the excessive deviation in this application of the word from its more ordinary geographical sense.

(*f*) The term sovereign, or sovereign power is, it need hardly be observed, not used in the sense of a king or monarch, but in the sense, in which it is employed by jurists, of the power, whatever its form, which is supreme in an independent political society. See *Austin's Jurisprudence*, 4th ed., p. 249.

It is worth while to dwell a little further upon the relation between the meaning of the word country, in its political sense of realm, and in its legal sense of law district.

Territories ruled by different sovereigns never constitute one country in either sense of the term, but a territory ruled by one and the same sovereign, *i.e.*, a realm, though it may as a fact constitute one country or law district, may also comprise several such countries or law districts.

Thus France, Italy, and Belgium each constitute one separate country in both senses of the term. France (including, of course, in that term French dependencies) is one country in the political sense of the word, and is also one country or law district in the legal sense of the term. On the other hand, the British Empire, while constituting one country or realm, consists of a large number of countries, in the legal sense of the word, since England, Scotland, Ireland, the Isle of Man, the different colonies, &c., are in this sense separate countries or law districts.

(3). *Foreign* and (4) *Foreign Country*.

The word "foreign" means, as used throughout these rules, simply not English. Thus, a Scotch parent is as much within the term foreign parent as an Italian or a Frenchman. Foreign country means any country except England, and applies as much to Scotland, Ireland, New Zealand, &c., as to France or Italy.

(5). *United Kingdom*.

The term, as defined, does not need any comment further than a reminder to readers who may not be accustomed to the legal use of the word, that the United Kingdom does not include the Channel Islands or the Isle of Man, whilst it does include other islands, such as the Isle of Wight or the Shetland Islands, which, for legal purposes, form part of England and Scotland respectively.

(6). *British Dominions*.

The meaning of the term does not admit of further explanation than is given by its definition.

(7). *Independent Person* and (8) *Dependent Person*.

An independent person means a person who, as regards the legal effect of his acts, is not dependent on the will of any other person, or, in other words, whose will is for legal purposes exercised by himself, and by himself alone. Since the term is used in this work with reference to a person's legal capacity for acquiring or changing his domicile by his own acts, it means, as here used, a person legally capable of effecting a change of domicile, and who is not liable to have it changed, by the act of any other person.

Such a person as is here described by the term independent person, is often called both by judges and text writers, a person *sui juris*. This expression is borrowed from Roman law. It is a convenient one, but is purposely avoided on account of the difficulty of transferring without some inaccuracy, the technical terms of one legal system to another. A reader, however, should bear in mind that, in reference to domicile, a person *sui juris* means, when the term is used, what is here called an independent person.

The position of an independent person has two characteristics, the one positive, the other negative. The positive characteristic is the full legal capacity to act for himself, especially in the change of domicile. The negative characteristic is freedom from liability to be legally acted for, and especially to have his domicile changed at the will of another person.

Under English law a man of full age, or an unmarried woman of full age, is such an independent person.

A dependent person means a person who, as regards the legal effects of his acts, is dependent, or liable to be dependent, on the will of another person, or, in other words, whose will, as regards its legal effects, cannot be exercised by himself, and may be exercised by another person. Since the term is used in this work with reference to a person's legal capacity for acquiring or changing his domicile by his own acts, it means, as here used, a person who is not legally capable of effecting a change of domicile

for himself, but whose domicile is liable to be changed (if at all) by the act of another. Such a dependent person is often termed by judges and text writers a person not *sui juris*; the term, though convenient, is avoided in these rules for the same reason for which the corresponding term person *sui juris* is not employed.

The position of a dependent person, has therefore two characteristics, the one negative, the other positive. The negative characteristic is legal incapacity to act for himself, especially in the change of domicile. The positive characteristic is liability to be legally acted for, and especially to have his domicile changed for him, by the act of another person.

Under different legal systems, different classes of persons are dependent persons. Under English law the two classes which indubitably fall within the term as already explained are—first, infants; and, secondly, married women (*g*).

Neither of these classes has the legal capacity to make a change of domicile, and both of these classes are liable to have it changed by the act of another person, who, in the case of infants (*h*), is generally the father, and in the case of married women (*i*), is always the husband.

The term “liable” in the definition should be noticed. It covers the case of a person (such as an infant without living parents or guardians) of whom it cannot be said that there is at the moment any person on whom he is dependent, or who can change his domicile. The infant is, however, even then not an independent person in the sense in which the word is here used. He is legally incapable of changing his own domicile (*k*), and liable to have it changed (if at all), by the act of a person appointed guardian (*l*).

(*g*) Lunatics are purposely not added. Their position in respect of capacity to effect a change of domicile is not free from doubt, but the better view seems to be that a lunatic's domicile cannot be changed by his committee. See pp. 132, 133, *post*.

(*h*) See Rule 9, sub-rule 1, pp. 96, 97, *post*.

(*i*) Rule 9, sub-rule 2, pp. 96, 104, *post*.

(*k*) See Rule 10, and sub-rule, pp. 106, 107, *post*.

(*l*) *Pottinger v. Wightman*, 8 Mer. 67; and as to a guardian's relation to his ward, see pp. 96, 97, 100, 101, *post*.

(9). *Lex domicilii* and (10) *Lex situs*.

The *lex domicilii* means the law of the country where a person is domiciled. Thus, if a testator dies domiciled in France, his *lex domicilii* or law of his domicile is the law of France.

The *lex situs*, means the law of the country where a thing, whether an immoveable, such as land, or a moveable such as a chattel, is situated. If, for example, it be laid down that rights to land in England are governed by the *lex situs*, or law of the situation, it is meant that these rights are to be determined by English law (*m*).

(11). *An immoveable* and (12) *a moveable*.

(i). The subjects of property are throughout this treatise divided into immoveables and moveables, or things which do not fall within the description of immoveables.

Immoveables are such things as land, houses, &c., whatever be the interest or estate which a person has in them. Hence the term includes what English lawyers call chattels real or leaseholds (*n*).

Moveables are, in the first place, such things as can be moved, *e.g.*, animals, money, stock-in-trade, and other

(*m*) There is a difference worth notice, between the use of the expression *lex domicilii*, and the use of the expression *lex situs*. The *lex domicilii* (or law of a person's domicile) means the law, whatever it may be, which the courts of the country where he is domiciled, will apply to his case. Thus when it is said that the validity of a will made by a person domiciled in France, depends on the *lex domicilii*, what is meant is, that the validity of the will must be determined by the rules of law, whatever they are, which French courts would apply to the case; but it is not meant to be asserted that French courts will necessarily apply to the case of every testator domiciled in France, *e.g.*, to the will of a British subject, the ordinary rules of French law governing wills made by French subjects. The *lex situs* on the other hand is generally if not invariably used as meaning the ordinary law of the country where a thing is situated. When, therefore, it is said that rights to land in England depend on the *lex situs*, what is meant is, not only that these rights must be determined according to the rules of law, whatever they are, applied to the case by English courts, but also that English courts will apply, in determining rights to land, the ordinary rules of English law.

(*n*) See 1 *Steph. Comm.* (7th ed.), p. 167; note (*a*), and p. 280.

goods and chattels ; and, secondly, "things" (using that word in a very wide sense indeed) which are the objects of a claim (such as money due from X. to A.) called by English lawyers "*choses in action*," in one of the senses (o) of that ambiguous term.

It is convenient to group under the one head of moveables, goods and *choses in action*, (the objects of a legal claim). For neither class falls under the rules as to immoveables, and each class is subject in many respects to the same rules of law. There is, however, this essential distinction between goods and *choses in action*, that goods have in fact a local situation, and *choses in action* (e.g., debts) have not. Hence, those rules as to moveables which depend upon an article having a real local situation, or occupying a definite space, do not apply to *choses in action*.

(ii). The division of the subjects of property into immoveables and moveables, does not square with the distinction known to English lawyers between *things real* (p) and *things personal* (q).

For though all things real are, with insignificant exceptions, included under immoveables, yet some immoveables are not included under things real; since "chattels real," or speaking generally, leaseholds, are included under immoveables, whilst they do not for most purposes come within the class of realty, or things real.

On the other hand, while all moveables are with trifling exceptions included under things personal or personalty, there are things personal, viz., chattels real, or speaking generally, leaseholds, which are immoveables, and no way affected by the rules hereinafter laid down as to moveables.

(o) *Chose in action* is used for—

- (i) the claim or right to a performance or service legally due from one man to another,
- (ii) the thing claimed, e.g., the debt due,
- (iii) the evidence of the claim, e.g., the bond on which a debt is due.

(p) See 1 *Steph. Comm.* (7th ed.), p. 167.

(q) See 2 *Steph. Comm.* (7th ed.), p. 2.

To put the same thing in other words "immoveables" are equivalent to realty, with the addition of chattels real or leaseholds; "moveables" are equivalent to personalty, with the omission of chattels real.

(iii). Law is always concerned not with things but with rights, and therefore not directly with immoveables or moveables, but with rights over, or in reference to, immoveables or moveables, or to use popular language, with immoveable property and moveable property. It will serve to make clear the relation between the division into immoveables and moveables, and the division into realty and personalty, if we treat each as a division, not of the subjects of property, but of the rights, of which property from a legal point of view consists.

Immoveable property, includes all rights over things which cannot be moved, whatever be the nature of such rights or interests.

Moveable property, includes both rights over moveable things, or goods, and rights which are not rights, over a definite thing, but are claims by one person against another; as the claim by A. to be paid a debt due to him by X., or *choses in action*.

Realty looked at as a division of rights, includes all rights over things which cannot be moved, except chattels real or leaseholds.

Personalty, includes both rights over moveables and choses in action, and also includes chattels real or leaseholds. Hence immoveable property is equivalent to realty with the addition of chattels real; moveable property is equivalent to personalty, with the omission of chattels real.

It is of consequence to notice the difference between moveables and things personal, because in several of the earlier cases determining the legal effect of domicile, the Judges used language which identifies moveables with personal property (*r*), and suggests the conclusion, that all

(*r*) See e.g., *Sill v. Worwick*, 1 Hy. Bl 665, 690, judgment of Lord Loughborough; *Birtwhistle v. Vardill*, 5 B. & C. 451, 452, judgment of Abbott, C.J.

kinds of personalty, including leaseholds, are, as regards the effect of domicil, (*e.g.*, in the case of intestate succession) governed by the rules which apply to moveables properly so called. This doctrine has now been pronounced erroneous, and leaseholds (it has been decided) are, in regard to the law of domicil, to be considered immovables (*s*).

(*s*) *Freke v. Lord Carbery*, L. R. 16 Eq. 461. *In goods of Gentili*, Irish L. R. 9 Eq. 541.

PART I.

NATURE, ACQUISITION, AND CHANGE OF DOMICIL (a).

Part I. deals with the nature, and with the acquisition and change of domicil.

The rules contained in it state the principles by which, when all the material circumstances of the case are known, to determine what is the country in which a given person is domiciled.

The subject of this part therefore differs from that of Part II., which treats of the evidence of domicil, and from that of Part III., which treats of the legal effects of domicil.

(a) See *Story*, s. 39 to 49d.

Phillimore, ss. 37—351.

Westlake, ss. 23—54.

Wharton, ss. 20—83.

Savigny (*Guthrie's Ed.*), ss. 350—359, pp. 42—88.

Bar, ss. 27—30.

CHAPTER I.

DOMICIL OF NATURAL PERSONS (*a*).

(i.) NATURE OF DOMICIL.

Rule 1.
Domicil of
natural
persons.

RULE 1.—The domicil of any person is, in general, the place or country which is in fact his permanent home (*b*), but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law.

No definition (*c*) of domicil has given entire satisfaction to English Judges. As, however, a person's domicil may certainly be described as the place or country which is considered by law to be his home, and as a place or country is usually, (though not invariably) "considered by law" (*i.e.*, by the court) to be a person's home, because it is so in fact, light is thrown on the nature of domicil by a comparison between the meanings of the two closely connected terms, home and domicil.

Home—
meaning of
home.

Home (*d*).—The word home is not a term of art, but a word of ordinary discourse, and is usually employed without technical precision. Yet, whenever a place or

(*a*) For domicil of legal persons or corporations, see Rule 12, p. 110, *post*.

(*b*) "Domicil meant permanent home, and if that was not understood by itself, no illustration could help to make it intelligible." *Whicker v. Hume*, 28 L. J. (Ch.) 396, 400, *per* Lord Cranworth; *Attorney-General v. Rowe*, 31 L. J. (Ex.) 314, 320. See further as to the meaning of "home," p. 44, *post*.

(*c*) See *Definition of Domicil*, App., Note I.

(*d*) See especially *Westlake*, ss. 30, 31.

country is termed, with any approach to accuracy, a person's home, reference is intended to be made to a connection or relation between two facts. Of these facts the one is a physical fact, the other is a mental fact.

The physical fact is the person's "habitual physical presence," or, to use a shorter and more ordinary term, "residence" (*e*), within the limits of a particular place or country. The mental fact is the person's "present intention to reside permanently, or for an indefinite period," within the limits of such place or country; or, more accurately, the absence of any present intention (*f*) on his part to remove his dwelling permanently, or for an indefinite period, from

(*e*) The term "residence" is used by Westlake and others, as synonymous with the word "home," *i.e.*, as including both "residence" in the sense in which the word is used in the text, and the "intention to reside" (*animus manendi*). To this use of the word residence, there is in itself no objection, but there is great convenience in appropriating (as is done throughout this treatise) the substantive residence and the verb reside to the description of the physical fact which is included in, but does not make up the whole of the meaning of, the word home. "Residence," has in many instances been employed by judges and others, to denote a person's habitual physical presence in a place or country which may or may not be his home. (See *e.g.*, *Jopp v. Wood*, 34 L. J. (Ch.) 212, 218; *Gillis v. Gillis*, Irish Rep. 8 Eq. 597.) It is hoped, therefore, that the restriction of the term "residence" to this sense alone does not involve too wide a deviation from the ordinary use of language.

Though it is of little importance in which sense the words "residence" or "reside" are employed, it is of considerable importance that they should be used in one determinate sense. Confusion has sometimes arisen from the employment of the word residence, at one time as excluding, and at another time as including, the *animus manendi*. Compare *Jopp v. Wood*, 34 L. J. (Ch.) 212, with *King v. Foxwell*, 3 Ch. D. 518.

The word "habitual," in the definition of residence, does not mean presence in a place either for a long or for a short time, but presence there for the greater part of the period, whatever that period may be (whether ten years, or ten days) referred to in each particular case.

(*f*) See *Story*, s. 43, for the remark that the absence of all intention to cease residing in a place is sufficient to constitute the *animus manendi*. The difficulty of determining where it is that a person has his home, or domicile, arises in general from the difficulty not only of defining, but of ascertaining, the existence of the very indefinite intention which constitutes the *animus manendi*. See *Attorney-General v. Pottinger*, 30 L. J. (Ex.) 284, 292, language of *Bramwell*, B.

such place or country. This mental fact is technically termed, though not always with strict accuracy, the *animus manendi* (g), or "intention of residence."

When it is perceived that the existence of a person's home in a given place or country, depends on a relation between the fact of residence and the *animus manendi*, further investigation shows that the word home, as applied to a particular place, or country, may be defined or described in the following terms, or in words to the same effect:—

Definition
of home.

A person's home is that place or country, either (i.) in which he, in fact, resides with the intention of residence (animus manendi) (h), or (ii.) in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence (animus manendi), or (iii.) with regard to which, having so resided there, he retains the intention of residence (animus manendi), though he in fact no longer resides there (i).

This definition or formula has undoubtedly a crabbed appearance. It, however, accurately describes all the circumstances or cases under which a given person, D. (k), may, with strict accuracy, be said to have a home in a particular country, e.g., England; or, in other words, in which England can be termed his home, and excludes the cases in which England cannot with accuracy be termed his home. The first clause of the formula or definition describes the conditions under which a home is acquired.

(g) It is often, in strictness, rather the *animus revertendi et manendi* than the *animus manendi*.

(h) The term *animus manendi*, or intention of residence, is intended to include the negative state of mind which is more accurately described as "the absence of any present intention not to reside permanently in a place or country."

(i) More briefly, a person's "home" is "that place or country in which, either he resides, with the intention of residence (*animus manendi*), or in which he has so resided, and with regard to which, he retains either residence or the intention of residence."

(k) D. is, throughout this treatise, used to designate the person, either whose domicile is in question, or upon whose domicile a legal right depends, or may be supposed to depend.

The second and third clauses describe the conditions under which a home is retained. The meaning and effect of the whole definition is most easily seen from examples of the cases in which, under it, a country can, and a country cannot, be considered D.'s home.

The cases to which the formula can be applied are six. Illustrations of definition.

(1). D. is a person residing in England, without any intention of leaving the country for good, or of settling elsewhere. England is clearly D.'s home. His is in fact the position of every ordinary inhabitant. There exists in his case, exactly that combination of residence and of purpose to reside, required by the first clause of the definition. The time for which his residence may have lasted is immaterial. A person may have resided in a country for a month, for a year, or for ten years; it may have been his residence for a longer or a shorter period, but from the moment when there exists the required combination of residence and intention to reside permanently (*animus manendi*), the country is his home, or, in popular language, he has his home in the country (1).

(2). D., an inhabitant of England, who has hitherto intended to continue residing there, makes up his mind to settle in France. His home, however, continues to be English till the moment when he leaves the country. It is till then retained by the fact of residence, though the *animus manendi* has ceased to exist. D. intends to abandon, but until he leaves the country, has not actually abandoned England as his home. This is the case of an intended change of home, which has not actually been carried out. It falls within the second clause of the definition of home.

(3). D. is an inhabitant of England, who has for years intended to live permanently in England. He goes to France for business or pleasure with the intention of

(1) See, as to the relation of time of residence to domicile, pp. 123—125, *post*.
 "It may be conceded that if the intention of permanently residing in a place exists, residence in that place, however short, will establish a domicile."
Bell v. Kennedy, L. R. 1 Sc. App. 307, 319, *per Lord Chelmsford*.

returning to England, and residing there permanently. England is still his home. It is so, because the intention of residence (*animus manendi*) is retained, although D.'s actual residence in England has ceased.

The case falls precisely within the third clause of the definition of home.

(4). D. has never, in fact, resided, and has never formed any intention of permanently residing in England. That D., under these circumstances, does not possess an English home, is too clear for the matter to need comment (*m*).

The case is one which obviously does not fall within, and is, in fact, excluded by, the definition already given of a home.

(5). D., who has been permanently residing in France, is for the moment in England, but has never formed the least intention of permanent residence there, being a traveller who has come to England for a time to see the country. He clearly has not, either in strictness or in accordance with ordinary notions, a home in England, and it is also clear that his case does not fall within the terms of the definition.

(6). D., lastly, is a person who has been permanently residing in France, but has formed an intention of coming to England, where he has not been before, and settling there. He has not yet quitted France. England clearly is not his home, and the case is one manifestly excluded from the terms of the definition (*n*).

From our formula, as illustrated by these examples, the

(*m*) The one apparent exception to this remark is the case of children and others, who have the home of some person, *e.g.*, a parent, on whom they depend. The explanation is, that such persons are considered as sharing the home of the person on whom they depend, rather than in strictness possessing a home of their own. See Rule 9 and sub-rules, pp. 96—105, *post*.

(*n*) Cases (4), (5), and (6) are, it may be said with truth, simply cases (1), (2), and (3) looked at, so to speak, from the other side. The six cases or examples, however, describe the six different relations in which a person may stand in respect of residence and *animus manendi* towards a given country, and are each worth observing in reference to questions which may arise as to domicil.

conclusion follows that, as a home is acquired by the combination of actual residence (*factum*), and of intention of residence (*animus*), so it is (when once acquired), lost, or abandoned, only when *both* the residence *and* the intention to reside cease to exist. If, that is to say, D., who has resided in England as his home, continues either to reside there in fact, or to retain the intention of residing there permanently, England continues to be his home. On the other hand, if D. ceases both to reside in England, and to entertain the intention of residing there permanently, England ceases to be his home, and the process of abandonment is complete. If, to such giving up of a home by the cessation both of residence and of the *animus manendi*, we apply the terms "abandon" and "abandonment," the meaning of the word home may be defined with comparative brevity.

A "home" (as applied to a place or country) means "the place or country in which a person resides with the *animus manendi*, or intention of residence, or which, having so resided in it, he has not abandoned."

This definition or description of a home, in whatever terms it is expressed, gives rise to a remark which will be found of considerable importance. This is that the conception of a place or country as a home is in no sense a legal or a technical idea, since it arises from the relation between two facts, "actual residence" and "intention to reside," neither of which has anything to do with the technicalities of law. A person might have a home in a place where law and law courts were totally unknown, and the question whether a given place is or is not to be considered a particular person's home is in itself a mere question of fact, and not of law (*o*).

It is worth while to insist on the non-legal, or natural character of the notion signified by the word "home," because from the definition of a home, combined with knowledge of the ordinary facts of human life, flow several

(o) See *Westlake*, n. 30. For the bearing of this remark on the law of domicil, see pp. 85, 86, *post*.

conclusions which have a very close connection with the legal rules, determining the nature, acquisition, and change of domicile.

Results of
definition
of "home."

Of these results, flowing from the definition of a home, considered merely as a natural fact, without any reference to legal niceties or assumptions, the following are the principal :—

(1) Most
but not all
persons
have
homes.

First—The vast majority of mankind (in the civilized parts of the world at least) have a home, since they generally reside in some country, *e.g.*, England or France, without any intention of ceasing to reside there. It is nevertheless clear, (if the thing be looked at merely as a matter of fact without any reference to the rules of law) that a person may be homeless (*p*). There may be no country of which you can at a given moment with truth assert, that it is in fact D.'s home.

D., for example, may be an English emigrant, who has left England for good, but is still on his voyage to America, and has not yet reached Boston, where he intends to settle. He has lost his home in England; he has not gained a home in America. He is in the strictest sense homeless. Here the residence which is the basis of a home does not exist. D., again, may be a traveller, who has abandoned his English home, with the intention of travelling from land to land, for an indefinite period, and with the fixed purpose of never returning to England. In this case also D. is homeless. He has no home, because he does not entertain that intention of residence, which goes to make up the notion of a home. D., again, may be a vagabond, *e.g.*, a gipsy who wanders from country to country, without any intention of permanently residing in any one place. Here, again, D. is homeless, because of the total want of any *animus manendi* (*q*).

In these, (and perhaps in some other instances) a person is as a matter of fact homeless, and if, as we shall find to

(*p*) Contrast this with Rule 2, p. 59, *post*, as to domicile.

(*q*) See for these cases of homelessness, *Savigny*, s. 354, p. 63.

be the case (r), he is considered by law to have a home in one country, rather than in another, or in other words, if he has a domicile, this is the result of a legal convention or assumption. He acquires a home not by his own act, but by the operation of law.

Secondly (s).—The definition of home suggests the enquiry, which has, in fact, been sometimes raised in the courts, whether a person can have more than one home at the same time or, in other words, whether each of two or more countries can at the same moment be the home of one and the same person? (2.) Can a person have more than one home?

The consideration of what is meant by "home" shews that (if the matter be considered independently of all legal rules) the question is little more than one of words.

The following state of facts certainly may exist. D. determines to live half of each year in France and half in England. He possesses a house, lands, and friends, in each country. He resides during each winter in his house in the South of France, and spends each summer in his house in England. His intention is to pursue the same course throughout his life. He entertains in other words the intention of continuing to reside in each country for six months in every year.

If the question be asked whether D. has two homes the answer is, that the question is mainly one of language. If the intention entertained by D. to reside in each country be not a sufficient *animus manendi* as to each, then D. is to be numbered among the persons who in fact have no home. If it be a sufficient *animus manendi* then D. is correctly described as having two homes (t).

(r) See Rule 2, p. 59, *post*.

(s) See Rule 3, p. 61, *post*. See on this point *Fiore*, p. 94, note 1.

(t) The question raised, though almost a verbal one, has given some trouble to writers on domicile. They have here as elsewhere somewhat confused a question of fact, and a question of law, and have occasionally failed to distinguish the question of fact whether D. can independently of legal rules have two homes, from the legal question whether it is or is not a rule of law, that a man cannot have more than one domicile.

(8.) Abandonment of one home may or may not coincide with acquisition of another

Thirdly.—The abandonment (u) of one home may either coincide with, or precede the acquisition of a new home. In other words, abandonment of one home may be combined with settlement in another home, or else may be the simple abandonment of one home, without the acquisition of another.

D., for example, goes from England where he is settled, to France on business. At the moment of leaving England, and on his arrival in France, he has the fullest intention of returning thence to England, as his permanent residence. This purpose continues for the first year of his residing in France. D. therefore, though living in France, still retains his English home. At the end of the year, he makes up his mind to reside permanently in France. From that moment he acquires a French, and loses his English home. The act of acquisition, and the act of abandonment, exactly coincide. They must from the nature of the case be complete, at one and the same moment.

The act of abandonment, however, often precedes the act of acquisition. D. leaves England with the intention of ultimately settling in France, but journeys slowly to France, travelling through Belgium and Germany. From the moment he leaves England, his English home is lost, since from that moment he gives up both residence and intention to reside in England, but during his journey, no French home is acquired, for though he intends to settle in France, residence there cannot begin till France is reached. The relation between the abandonment of one home, and the acquisition of another, deserves careful consideration, for two reasons.

The first reason is, that the practical difficulty of deciding in which of two countries a person is at a given moment to be considered as domiciled, arises (in general) not from any legal subtleties, but from the difficulty of determining at what moment of time, if at all, a person resolves to make a country, in which he

(u) See Rule 8, p. 86, *post*.

happens to be living, his permanent home. The nature of this difficulty is well illustrated by a recent case. The question to be determined was, whether D., who at one time possessed a home in Jamaica, had or had not in the year 1838 acquired a home in Scotland. No one disputed that in 1837 he had left Jamaica for good and was residing in Scotland. It was further undisputed that some years later than 1838 he had acquired a Scotch home or domicile. The matter substantially in dispute was whether at the date in question D. had made up his mind to reside permanently in Scotland. The case came on in 1868, and D. himself gave evidence as to his own intentions in 1837. His honesty was undoubted, but the court, though having the advantage of D.'s own evidence, found the question of fact most difficult to determine, and in the result took a different view (chiefly on the strength of letters written in 1837) from that taken by D. himself of what was then his intention as to residence (x).

The second reason is, that there exists a noticeable difference between the natural result of abandonment, and the legal rule (y) as to its effect. As a matter of fact, a person may abandon one home without acquiring another. As a matter of law, no man can abandon his legal home or domicile without, according to circumstances, either acquiring a new, or resuming a former domicile.

Fourthly.—From the fact that the acquisition of a home depends upon freedom of action or choice, it follows that a large number of persons (z) either cannot or usually do not determine for themselves where their home shall be. Thus, young children cannot acquire a home for themselves, boys of thirteen or fourteen, though they occasionally do determine their own place of residence, more generally find their home chosen for them by their father or guardian, the home of a wife is usually the same as that of the husband, and, speaking generally, persons dependent

(x) *Bell v. Kennedy*, L. R. 1 Sc. App. 307.

(y) See Rule 8, p. 86, *post*.

(z) See Rule 9, and sub-rules, pp. 96—106, *post*.

upon the will of others have, in many cases, the home of those on whom they depend. This is obvious, but the fact is worth notice, because it lies at the bottom of what might otherwise appear to be arbitrary rules of law, *e.g.*, the rule that a wife can in no case have any other domicile than that of her husband (*a*).

Domicil.
Meaning
of domicile,
not same
as mean-
ing of
home.

Domicil.—As a person's domicile is the place or country which is considered by law to be his home, and as the law in general holds that place to be a man's home which is so in fact, the notion naturally suggests itself that the word "domicil" and the word "home" (as already defined) mean in reality the same thing, and that the one is merely the technical equivalent for the other (*b*).

"It has occurred to me," says Baron Bramwell, "... whether one might not interpret this word 'domicil' by 'substituting the word 'home' for it—not home in the sense in which a man who has taken a lodging for a week 'in a watering place might say he was going home, nor

(*a*) From an examination into the meaning of the word "home," when it is strictly employed, we can trace the connection between the word when used with accuracy, and its application in various lax or metaphorical senses.

In all cases there exists a more or less distinct reference to the ideas of residence and intention to reside. Thus, when a lodger says he is "going home" to his lodging, the place where he lives is certainly not a permanent residence. Still, the speaker intends to look upon it for the moment in the character of a more or less permanent abode.

A colonist, again, calls England his home. In the mouth of the original settler the expression may perhaps have been used at first with accuracy, and have been an assertion of his intention to return and reside in England (*animus revertendi*).

He or his children continue to use the expression when no real intention to return any longer exists. What is then meant is that the speaker entertains towards England the sentiments which a person is supposed to entertain towards the land which is in reality his home.

In these and like instances may be traced a transition from inaccurate statement of fact to the use of conscious metaphor. What is worth notice is that the ideas of "residence" and of "intention to reside" are not entirely absent from even the metaphorical uses of the word "home."

(*b*) The two words differ "no otherwise than as in all sciences, common words, on becoming technical, are limited in meaning for the sake of precision." *Westlake*, s. 30.

"home in the sense in which a colonist born in a colony, intending to live and die there, might say he was coming home when he meant coming to England, but using the word home in the sense in which a man might say, 'I have no home; I live sometimes in London, sometimes in Paris, sometimes in Rome, and I have no home'" (c).

The notion, however, expressed in the passage cited is, though countenanced by high authorities, fallacious. This idea, that the word home means, when strictly defined, the same thing as the term domicile, is based on the erroneous assumption, that the law always considers that place to be a person's home, which actually is his home, and on the omission to notice the fact, that the law in several instances attributes to a person a domicile in a country where in reality he has not, and perhaps never had a home. Thus the rule that a domiciled Englishman, who has in fact abandoned England without acquiring any other home, retains his English domicile (d), or the principle, that a married woman is always domiciled in the country where her husband has his domicile, involves the result, that a person may have a domicile who has no home, or that a woman may occasionally have her domicile in one country, though she has her real home in another. An attempt therefore to obtain a complete definition of the legal term domicile, by a precise definition of the non-legal term home, can never meet with complete success, for a definition so obtained will not include in its terms the conventional or technical element, which makes up part of the meaning of the word domicile (e).

The question may naturally occur to the reader, why is it Cause of
difference

(c) *Attorney-General v. Rowe*, 31 L. J. (Ex.) 314, 320, *per Bramwell*, B.

(d) See Rule 8, p. 86, *post*.

(e) This conclusion is confirmed by an examination of the received definitions of domicile. They are all or nearly all definitions of a domicile of choice, i.e., a domicile acquired by the party's own act, and do not include the cases in which domicile is imposed (independently of the party's choice) by a rule of law, but a "domicile of choice," is nearly or all but equivalent to the word "home." As to domicile of choice, see pp. 73—86, *post*. See also *Definition of Domicile*, App., Note I.

between
meanings
of home
and of
domicil.

that the term domicil should not be made to coincide in meaning with the word home, or in other words why is it that the courts consider in some instances that a place is a person's home, which is not so in fact?

The answer is as follows. It is for legal purposes of vital importance, that every man should be fixed with some home or domicil, since otherwise it may be impossible to decide by what law his rights, or those of other persons, are to be determined. The cases, therefore, of actual homelessness, must be met by some conventional rule, or in other words, a person must have a domicil, or legal home, assigned to him, even though he does not possess a real one. It is, again, a matter of great convenience that a person should be treated as having his home, or being domiciled, in the place where persons of his class or in his position, would in general have their home. The law, therefore, tends to consider that place as always constituting a person's domicil which would generally be the home of persons occupying his position. Thus, the home of an infant, is generally that of his father, and the home of a wife, is generally that of her husband. Hence the rule of law assigning to an infant, in general, the domicil of his father, and to a married woman, invariably, the domicil of her husband.

These considerations of necessity or of convenience, introduce that conventional element into the rules as to domicil which make the idea itself a technical one and different from the natural conception of home. As these conventional rules cannot be conveniently brought under any one head there is a difficulty in giving a neat definition of domicil as contrasted with home. Since, however, the courts generally hold a place to be a person's domicil because it is in fact his permanent home, though occasionally they hold a place to be a person's domicil because it is fixed as such by a rule of law, a domicil may accurately be described in the terms of our rule, and we may lay down that a person's domicil is in general the place or country which is in fact his permanent home, though in some cases

it is the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law (*f*).

Comparison of home and domicil.—The word home denotes a merely natural and untechnical conception, based upon the relation between a person's residence and his intention as to residence. The term domicil is a name for a legal conception, based upon, and connected with, the idea of home, but containing in it elements of a purely legal or conventional character. Whether a place or country is a man's home, is a question of fact. Whether a place or country is a man's domicil, is a question of mixed fact and law, or rather of the inference drawn by law from certain facts, though in general the facts which constitute a place a man's home are the same facts as those from which the law infers that it is his domicil.

One remark which is applicable both to home and domicil deserves attention, and has reference to what we may term the "place," or "area," of domicil.

The definition given in this treatise of "home," as also the definition of "domicil" (for in this point they need not be distinguished) suits, it will be observed, any "place" whatever its limits, and applies equally well to a house or to a country. Thus, if D. resides at No. 1, Regent Street, with the intention of permanently residing in that house, the definition of home suits that house, no less than it suits England, and if any legal result were to depend upon D.'s living at No. 1, Regent Street, rather than in Westminster, the definition of domicil would apply to No. 1, Regent Street, as being the place which is considered by law to be D.'s home. It will also be observed that though the words home and domicil, as used in this treatise, are applicable to any place whatever, yet that the "place" obviously contemplated throughout these rules, is a "country" or "territory subject to one system of law" (*g*).

(*f*) See as to distinction between domicil arising from act of party and domicil imposed by operation of law, *Classification of Domicils*, App., Note II.

(*g*) See Interpretation Clause, p. 1, *ante*.

The reason for this is, that though the rules for the determination of a person's domicile are in principle equally applicable, whatever the area or the extent of the place within which a person's domicile is to be determined, the main object of this treatise is to shew how far a person's rights are affected by his having his legal home or domicile within a territory governed by one system of law, *i.e.*, within one given country (*h*), rather than within another. When once his domicile is so far determined, the question within what part of that country (or law district) he is domiciled, becomes, for the purposes of this work, immaterial. To decide whether D. has his legal home in England, is important, because upon that fact depends whether certain of his rights are or are not affected by English law. To determine whether D. has his legal home in Middlesex, or in Surrey, is, for the purpose of this treatise, unimportant, since in either case he comes within the operation of the same system of law.

If, indeed, it happened that one part of a country governed generally by one system of law, was in many respects subject to special rules of law, then it might be important to determine, whether D. were domiciled within such particular part, *e.g.*, Brittany, of the whole country, France; but in this case, such part would be *pro tanto* a separate country, in the sense in which that term is employed in these rules.

Person
may be
domiciled
in country
and not in
any
particular
place
therein.

It may, indeed, be suggested, that the two inquiries, whether D. is domiciled in England, and whether D. has his domicile or home in a particular place or house in England, are inevitably connected, because England cannot be D.'s domicile, unless he has a home, or is assumed by law to have a home, at some particular place, or in some particular house in England. This suggestion rests on the idea that a person cannot be domiciled in a country unless he has a domicile at some particular place in that

(*h*) As to meaning of country, see pp. 1, 31, *ante*.

country. This notion, however, is (it is conceived) erroneous (i).

It is, of course, obvious that if D. has a home or domicile in one particular place in a country, he is domiciled in that country, *e.g.*, England, and within any wider area or territory including that country, *e.g.*, the United Kingdom; it is also clear that in this case the reason why D. is known to be domiciled in England, is that he is known to have a home at some definite place in England, *e.g.*, No. 1, Regent Street, where he resides, with the intention of residing in that house permanently; but, though the fact of a person having a domicile in one part of England establishes for certain and is in general the ground on which you know that he is domiciled in England, the converse does not hold good. D. may reside in England, with the full intention of residing permanently in England, and may therefore be domiciled there, and this fact may be well known, and capable of proof, and yet there may be no one place in England which can be termed D.'s home, or domicile, within the terms of our definition (j). This has been thus laid down, by a Scotch Judge:

"I cannot admit what Lord Fullerton assumes to be the rule, that, in order to make a domicile, it is necessary to have some particular spot within the territory of a law—that it is not enough that the party shall have an apparently continual residence there, but shall actually have a particular spot, or remain fixed in some permanent establishment. In considering the *indicia* of domicile these things are important; but they are not necessary, as matters of general law, to constitute domicile. Many old bachelors never have a house they can call their own. They go from hotel to hotel, and from watering-place to watering-place, careless of the comfort of more permanent residence, and unwilling to submit to the *gêne* attendant on it. There was the case of a nobleman who always lived

(i) *Conf. Doucet v. Geoghegan*, 9 Ch. D. 441, especially judgment of Brett, L. J., p. 457.

(j) For definition of home, see p. 44, *ante*.

"at inns, and would have no servants but waiters; but he did not lose his domicile on that account.

"If the purpose of remaining in the territory be clearly "proved *aliter*, a particular home is not necessary" (*k*).

The principle laid down in the passage cited is of importance. For if many of the received and best definitions of domicile be adopted, and the unnecessary assumption be also made, that a person who is domiciled in a country must be necessarily domiciled at some definite place in that country, the result will follow, that persons whom every one will admit to have an English domicile cannot be shewn to be domiciled in England.

Take, for example, Story's definition of the term domicile—viz., "that place in which a person's habitation is fixed "without any present intention of removing therefrom" (*l*), and apply it to the following case: D. is a Frenchman, settled for years in England, but living in lodgings at Manchester. His full intention is to live permanently in England, but he has no intention of residing more than a limited time in Manchester. His intention may be to spend his life successively in different parts of England, or his purpose may be to go after six months to London, and occupy a house there (which he has already bought) for the rest of his life. Under these circumstances, there is no one place in England which is his home or domicile. Manchester is not his home, because though he resides there, he has, as regards Manchester, no intention of permanent residence. No other place in England is his home, because though he may intend to reside in London, he has not begun to reside there in fact. The solution of the difficulty, which might in fact arise with reference, *e.g.*,

(*k*) *Arnott v. Groom*, Court of Session Cases, 1846, 9 D. 142, p. 150, per Lord Jeffrey.

(*l*) *Story*, s. 43. See *Doucet v. Geoghegan*, 9 Ch. D. 441. In this case the testator certainly was domiciled in England, for he "had the intention of residing in England permanently," but it can hardly be said that he was domiciled in his house in London, which he took on a lease for three years.

to the disposition of D.'s property, if he were to die before leaving Manchester, is, that though not domiciled at any one place in England, he has an English domicile, since with regard to England, there exists on D.'s part, both residence and the *animus manendi* (m).

RULE 2.—No person can at any time be without a domicile (n).

Rule 2.

Every
person
has a
domicil.

"It is a settled principle that no man shall be without a domicile" (o). "It is clear that by our law a man must have some domicile" (p), or (to use the expression of another authority) "it is an undoubted fact that no man can be without a domicile" (q).

The principle here laid down is, in effect, that for the Home assigned

(m) The fact which should be constantly kept in mind is, that domicile may be defined for different purposes with reference to different areas, and further, that a person may have a full intention of residence as to one place or area, and not as to any narrower place or area within it. In other words D. may have the fullest intention of residing permanently in France or England, but may not have an intention of residing permanently in London or Paris. The question as to the place or area within a country to which a person's intention of residence applies, may conceivably become of importance. Thus D., a Frenchman, resides at Strasburg in 1870, and goes abroad without any intention of abandoning France as his home. He dies immediately after the cession of Strasburg to Germany. The question (presuming that the Treaty of cession made no provision for such cases) might arise as to whether D.'s domicile were French or German at the date of his death. The question ought, according to the principles maintained by the English Courts, to be determined with reference to D.'s intention. If it were known that he intended to leave Strasburg, though not to abandon France, his domicile would be French. If, on the other hand, it was known that he intended to reside permanently at Strasburg, his domicile might be maintained to be German. The very question whether a person could be domiciled in a country, without being domiciled in any particular place in it, was, through the separation of Queensland from New South Wales, nearly raised in *Platt v. Attorney-General of New South Wales*, 8 App. Cas. 336, but it was not definitely decided.

(n) *Udny v. Udny*, L. R. 1 Sc. App. 441, 453, 457; *Bell v. Kennedy*, L. R. 1 Sc. App. 307.

(o) *Udny v. Udny*, L. R. 1 Sc. App. 441, 457, per Lord Westbury.

(p) *Ibid.*, p. 447, per Hatherley, C.

(q) *Ibid.*, p. 453, per Lord Chelmsford.

by law
to persons
in fact
homeless.

purpose of determining a person's legal rights or liabilities, the courts will invariably hold that there is some country in which he has a home, and will not admit the possibility of his being in fact homeless (*r*), or, in other words, even if he is in fact homeless, a home will, for the purpose of determining his legal rights, or those of other persons, always be assigned to him by a presumption or fiction of law. The mode by which this result is achieved, will appear from the rules laid down in this and a subsequent chapter. It consists for the most part in the assumption that everyone for whom no other domicile can be found, retains what is called his domicile of origin (*s*), *i.e.*, the domicile assigned to him by a rule of law, at the time of his birth, combined with the principle that a domicile is retained until it is changed by the act of the domiciled person himself, or in some cases by the act of a person on whom he is dependent (*t*).

The following examples, show the way in which a home may be assigned to a person who is in fact homeless. The principles on which the determination of a person's home in these cases depends, will be gathered from the rules referred to, in connection with each case.

D. is a domiciled Englishman (*u*), born of parents domiciled in England. He leaves England for America, intending to settle there. The ship is lost and D. dies on the voyage. He is domiciled at the time of his death in England (*v*).

D., a domiciled Englishman, leaves England with the intention of never returning there, and travels about the world without settling anywhere. He is domiciled in England (*x*).

(*r*) See as to the principle that not only has a person always a home, but that his home can always be ascertained, Rule 13, p. 114, *post*.

(*s*) See Rule 8, p. 86, *post*. See also Rule 13, p. 114, *post*.

(*t*) Rule 4, p. 66, *post*.

(*u*) See Rule 8, p. 86, *post*, and *Bell v. Kennedy*, L. R. 1 Sc. App. 307. Would it make any difference if D. were embarked on an American ship?

(*v*) *Ibid*.

(*x*) The expression domiciled Englishman or Englishwoman, domiciled Frenchman or Frenchwoman, &c., means a man or woman domiciled in England, or a man or woman domiciled in France, &c.

D. is a vagabond who has never settled in any country whatever. On his death a question arises as to his domicile (y). The decision of the question is really a matter of evidence, but if nothing be known of D., he will be held domiciled in the country where he dies.

RULE 3.—Subject to the exception hereinafter mentioned, no person can have at the same time more than one domicile (?) (z).

Rule 3.
No person
can have
more than
one
domicil.

"It is clear that by our law a man must have some "domicil, and must have a single domicile" (a).

The courts when called upon to determine rights, e.g., of succession, depending on D.'s domicile at a given time, will assume as a rule of law that D. was at the time in question domiciled in some one country only.

Thus the question, who is to succeed to D.'s property, as far as its decision depends upon the law of D.'s domicile, will always be determined with reference to the law of one country alone. If it be doubtful whether D. was at his death domiciled in England or in Scotland, the minutest evidence will be weighed in order to settle in which of the two countries he had his legal home, but our courts will always decide that he died domiciled in one country only, and will not admit the possibility of his dying domiciled in two countries.

(y) See p. 117, *post*.

(z) In support of this rule see *Udny v. Udny* (L. R. 1 Sc. Ap. 441, 448), *Somerville v. Somerville*, 5 Ves. 749a, and note especially the absence of any case in which a person has been held to have more than one domicile at the same time.

As throwing some doubt on the rule, see *In re Capdevielle*, 38 L. J. (Ex.) 306, 2 H. & C. 985; *Croker v. Marquis of Hertford*, 4 Moore P. C. 339.

According to Savigny a person may have more than one domicile! (*Savigny*, s. 354, pp. 62, 63).

See for a discussion of the whole subject, *Phillimore*, ss. 51—60.

(a) *Udny v. Udny* L. R. 1 Sc. App. 441, 448, *per Hatherley*, C.

Question. Can a person have different domicils for different purposes?
 Can a person have different domicils for different purposes?

Can a person have different domicils for different purposes?

It is clear that no man can for the same purpose, *i.e.*, when the determination of one and the same class of rights is in question, be taken to have a domicile in more countries than one at the same time.

A doubt has, however, been raised, whether a person cannot have at the same moment a domicile in one country for the determination of one class of rights (*e.g.*, rights of succession), and a domicile in another country for the determination of another class of rights (*e.g.*, capacity for marriage).

"The next rule is," it has been said, "that though a man may have two domicils for some purposes, he can have only one for the purpose of succession. That is laid down expressly in *Denisart*, under the title *Domicil*; that only one domicile can be acknowledged for the purpose of regulating the succession to the personal estate. I have taken this as a maxim, and am warranted by the necessity of such a maxim; for the absurdity would be monstrous, if it were possible that there should be a competition between two domicils as to the distribution of the personal estate. It could never possibly be determined by the casual death of the party at either. That would be most whimsical and capricious. It might depend upon the accident whether he died in winter or summer, and many circumstances not in his choice, and that never could regulate so important a subject as to the succession to his personal estate" (b).

"I apprehend," says Pollock, C.B., "that a peer of England who is also a peer of Scotland, and has estates in both countries, who comes to Parliament to discharge a public duty, and returns to Scotland to enjoy the country, is domiciled both in England and Scotland. A lawyer of the greatest eminence, formerly a member of this court, and now a member of the House of Lords, to whose opinion I, in common with all the profession, attach the greatest

(b) *Somerville v. Somerville*, 5 Vesey, 749a, 786, per Alounley, M. R.

"importance, once admitted to me that for some purposes a man might have a domicile both in Scotland and England. I cannot understand why he should not" (c).

"The facts and circumstances," writes Phillimore, "which might be deemed sufficient to establish a commercial domicile in time of war, and a matrimonial, or forensic, or political domicile, in time of peace, might be such as, according to English law, would fail to establish a testamentary or principal domicile." 'There is a wide difference,' it was observed in a judgment delivered in a recent case before the Judicial Committee of the Privy Council, 'in applying the law of domicile to contracts and to wills' (d).

If the notion suggested by these authorities be correct, Rule 3 must be modified and run:—

"No person can *for the same purpose* have at the same time more than one domicile."

The Rule, however, as it stands, is probably correct. The notion that a person may be held in strictness to have been domiciled in Scotland for the purpose of determining the validity of his will, and to have been domiciled at the same moment, in Germany, for the purpose of determining the validity of his marriage (in so far as that depends upon domicile), is opposed to the principles by which the law of domicile is governed, and is not, it is believed, supported by any decided case.

The prevalence of the notion is due to two causes:—

First.—The term "domicil" is often used in a lax sense, meaning no more than is meant by the term "residence" as used in this treatise. Thus, a "forensic domicile," or a "commercial domicile" (e), often signifies something far short of domicile strictly so-called. Now, it is obvious that a person may have a "residence" in one place, and a "domicil" in another (f), and that residence may often

(c) *In re Capdevielle*, 33 L. J. (Ex.) 306, 316, per Pollock, C.B.

(d) Phillimore, s. 54; *Oroker v. Marquis of Hertford*, 4 Moore P. C. 339.

(e) See *Commercial domicile in time of war*, App., Note III.

(f) *Gillis v. Gillis*, Ir. L. R. 8 Eq. 597.

be sufficient to confer rights, or impose liabilities (*g*). It is from cases in which "residence" alone has been in question that the possibility of contemporaneous domicils in different countries for different purposes has suggested itself. Thus D., though domiciled in France, can, if present in England, be sued in our courts. This fact has been expressed by the assertion that D. has a forensic domicil in England—an expression which certainly countenances the notion that D. is for one purpose domiciled in England, and for another in France. A forensic domicil, however, means nothing more than such residence in England as renders D. liable to be sued; the co-existence, therefore, of a forensic domicil in one country, and of a full domicil in another, is simply the result of the admitted fact that a person who resides in England may be domiciled in France, and does not countenance the idea that D. can in strictness be at one and the same moment domiciled both in France and in England.

Secondly.—The inquiry, which of two countries is to be considered a person's domicil, has (especially in the earlier cases) been confused with the question, whether one person can at the same time have a domicil in two countries (*h*).

D. is a Scotchman. He has a family estate in Scotland. He purchases a house and marries in England, where he generally lives with his wife. He, however, visits Scotland every summer, and goes to his estate there during the shooting season.

On his death in England intestate, a question arises as to the succession to D.'s moveable property (*i*).

The question must be decided with reference to the law of Scotland, or of England, according to the view taken of D.'s domicil.

The decision depends on a balance of evidence. Probably

(*g*) *e.g.*, to the payment of income tax. *Attorney-General v. Coots*, 4 Price 183; 16 & 17 Vict. c. 34, s. 2.

(*h*) See *Forbes v. Forbes*, 28 L. J. (Ch.) 724; *Kay* 341.

(*i*) Rules 66, 67, pp. 291, 293, *post*.

if there are no other circumstances than those stated, the courts will hold him domiciled in England (i).

Exception.—A person within the operation of 24 & 25 Vict. c. 121 (j), may possibly have one domicile for the purpose of testate or intestate succession, and another domicile for all other purposes.

Case within 24 & 25 Vict. c. 121.

The general effect of 24 & 25 Vict. c. 121 is to enable the Crown to make a convention with any Foreign State, the effect of which convention shall be that no British subject dying in the country to which the convention applies, or subject of such country dying in the United Kingdom, shall be deemed to have acquired a domicile in the country where he dies, unless he has fulfilled the conditions provided by the Act. This enactment apparently applies only to domicile for purposes of testate or intestate succession, and does not affect a person's domicile for other purposes, *e.g.*, the determination of legitimacy or of the validity of a marriage.

If a convention were made under it (k), *e.g.*, with France, a case such as the following might arise.

D., a British subject, dies (after the supposed convention) domiciled, in fact, in France, though resident at the moment in England. He has failed to comply with the provisions of 24 & 25 Vict. c. 121, s. 1. As regards, therefore, succession to his moveables (l), he is held domiciled in England.

A further question arises as to the legitimacy of D.'s

(i) See *Forbes v. Forbes*, 23 L. J. (Ch.) 724; *Kay* 341; compared with *Aitchison v. Dixon*, L. R. 10 Eq. 589.

(j) For this Act, see *Foreign Wills Acts*, App., Note IX.

(k) No convention has been made under the Act, which is, therefore, at present a dead letter. A question might be raised whether the Act does not apply to the acquisition of domicile for all purposes, but the interpretation here put upon it, which makes it apply only to domicile for the purpose of testate and intestate succession, is probably correct.

The terms "foreign" and "country" used in the Act have not the precise sense given to these terms in the rules in this treatise.

(l) See Rule 66, p. 291, *post*.

child, born in France, after D.'s acquisition of a French domicile (*m*).

This question must probably be decided on the view of D.'s being domiciled in France.

D., therefore, will be held for one purpose to have had an English, and for another, to have had a French domicile at the same time.

Rule 4.

Domicil
retained
until
changed
by some
act of
person
capable of
changing
it.

RULE 4.—A domicile once acquired is retained until it is changed

- (1) in the case of an independent person, (*n*)
by his own act ;
- (2) in the case of a dependent person, (*n*) by
the act of some one on whom he is
dependent.

The principle here enunciated may (it being granted that no one can have more than one domicile) appear too obvious to need statement, but requires to be attended to, as it lies at the bottom of most of the rules as to the acquisition and change of domicile (*o*).

The operation of the rule may be thus illustrated.

D. is in possession of an English domicile. This domicile he will retain until some act is done, on the part of the person capable of changing it, which amounts to the legal acquisition or resumption of another domicile.

If D. is a man of full age then the person capable of changing his domicile is D. himself, and D. will retain his English domicile until some act on his own part which has the legal effect of changing it for, *e.g.*, a French domicile (*p*).

If D. is an infant, the person capable of changing D.'s

(*m*) See Rule 35, p. 181, *post*.

(*n*) See for meaning of term, pp. 34, 35, *ante*.

(*o*) See Rules 5—11, pp. 67—109, *post*.

(*p*) As to the mode in which one domicile can be changed for another, and the difference in this respect between the domicile of origin and a domicile of choice, see Rule 8, p. 86, *post*.

domicil is the person on whom D. is, for this purpose at any rate, dependent, who in most instances is D.'s father. D. retains his domicil until some act on the part of his father changes it. The only act, it may even here be added, which can have that effect is a change in the father's own domicil (*r*).

(ii.) ACQUISITION AND CHANGE OF DOMICIL.

A. *Domicil of Independent Persons* (*s*).

RULE 5.—Every independent person has at any given moment either

- | | |
|---|--|
| <p>(1) the domicil received by him at (or as from) (<i>t</i>) his birth (which domicil is hereinafter called the domicil of origin) (<i>u</i>), or,</p> <p>(2) a domicil (not being the same as his domicil of origin) acquired by him while independent by his own act (which domicil is hereinafter called a domicil of choice) (<i>x</i>).</p> | <p><u>Rule 5.</u></p> <p>Every independent person has (1) domicil of origin, or (2) domicil of choice.</p> |
|---|--|

Every independent person, which term includes every man or (unmarried) woman, of full age, has at any given moment of his life either the same domicil as that which

(*r*) See Rule 9, sub-rule 1, p. 97, *post*.

(*s*) See for meaning of term, pp. 34, 35, *ante*.

(*t*) These words cover the exceptional case of a "legitimated person" whose domicil cannot in strictness be said to be received at birth.

(*u*) See Rule 6, p. 69, *post*. The expression domicil of origin, though borrowed from Roman law, has a different sense from the expression *domicilium originis*. *Savigny*, ss. 351, 352; pp. 45—53.

(*x*) See Rule 7, p. 73, *post*.

he received at birth, technically called the domicile of origin, or a different domicile, which he has acquired when of full age, by his own act and choice, technically called a domicile of choice.

The fact to be noticed is, that an independent person cannot, by any possibility, be at any time without one or other of these domicils. If he is at any moment not in possession of his domicile of origin, he is in possession of a domicile of choice. If he is at any moment not in possession of a domicile of choice, then he is at that moment in possession of his domicile of origin. That this is so results from the rule of law that any person *sui juris*, who at any moment has no other domicile, is assumed to be in possession of his domicile of origin (z).

D.'s domicile of origin is, we will suppose, English. What the rule lays down is, that D. being an independent person, will at any moment be found to be domiciled either in England, or in some other country, such as France, in which he has settled, or acquired for himself a home (a). It is of course possible (as before pointed out) (b) that D. may be in fact homeless, as where he has left England for good, and has not yet settled in France, or where having settled in France he has left France for good and is on his way to America; but under these circumstances he has his domicile or legal home in England (c), *i.e.*, he is legally in possession of his domicile of origin.

The two domicils differ from each other in two respects; first, in their mode of acquisition (d); and secondly, in the mode in which they are changed (e).

(z) See pp. 59—61, *ante*.

(a) Rule 3, p. 61, *ante*, precludes the possibility of D.'s being domiciled both in England and in France.

(b) See p. 48, *ante*.

(c) See Rule 8, p. 86, *post*.

(d) See Rules 6 and 7, pp. 69, 73, *post*.

(e) See Rule 8, p. 86, *post*.

Domicil of Origin.

RULE 6.—Every person receives at (or as from) birth a domicil of origin (*g*). Rule 6.

- | | |
|---|---|
| <p>(1) In the case of a legitimate infant born during his father's lifetime, the domicil of origin of the infant is the domicil of the father at the time of the infant's birth (<i>h</i>).</p> <p>(2) In the case of an illegitimate (<i>i</i>) or posthumous (<i>k</i>) infant, the domicil of origin is the domicil of his mother at the time of his birth.</p> <p>(3) In the case of a foundling, the domicil of origin is the country where he is born or found (<i>l</i>).</p> <p>(4) In the case of a legitimated person, the domicil of origin is the domicil which his father had at the time of such person's birth (<i>m</i>).</p> | <p>Domicil of origin how acquired.</p> <p>(1) Legitimate infant.</p> <p>(2) Illegitimate infant.</p> <p>(3) Foundling.</p> <p>(4) Legitimated person.</p> |
|---|---|

(*g*) *Udny v. Udny*, L. R. 1 Sc. App. 441, 450, 457.

Munroe v. Douglas, 5 Madd. 379.

Forbes v. Forbes, 23 L. J. (Ch.) 724; Kay 341.

Dalhousie v. McDouall, 7 Cl. & F. 817.

Munro v. Munro, 7 Cl. & F. 842.

Re Wright's Trusts, 2 K. & J. 595; 25 L. J. (Ch.) 621.

Somerville v. Somerville, 5 Ves. 749 a, 786, 787.

Story, s. 46.

Westlake, ss. 33—36.

Phillimore, ss. 67—69, 211—228.

Savigny, ss. 353, 354, pp. 53—62.

(*h*) *Udny v. Udny*, L. R. 1 Sc. App. 441; *Dalhousie v. McDouall*, 7 Cl. & F. 817; and *Westlake*, s. 35.

(*i*) *Re Wright's Trusts*, 2 K. & J. 595; 25 L. J. (Ch.) 621.

(*k*) *Westlake*, s. 35. Authority (!)

(*l*) *Ibid.*

(*m*) *Udny v. Udny*, L. R. 1 Sc. App. 441; *Dalhousie v. McDouall*, 7 Cl. & F. 817; *Munro v. Munro*, *ibid.*, 842.

Every person is held by an absolute rule, or fiction, of law, to be at birth domiciled, or to have his legal home, in the country in which, at the time of the infant's birth, the person (in most cases the infant's father) on whom the infant is legally dependent is then domiciled.

As to this domicile of origin, the following points require notice :—

Domicil of
origin
fiction of
law.

First.—The existence of a "domicil of origin" must be considered a fiction or assumption of law.

"The law of England and of almost all civilized countries ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status*; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status*. The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend. International law depends on rules which, being in great measure derived from the Roman law, are common to the jurisprudence of all civilized nations. It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother if illegitimate" (n).

(n) *Udny v. Udny*, L. R. 1 Sc. App. 441, 457, per Lord Westbury. It should be noticed that the opinion of foreign jurists and (to a certain extent) the enactments of foreign codes tend to do away with the distinction between

The aim of the fiction which assigns to every one from the moment of his birth a domicile of origin is to ensure that no man shall be at any moment without a legal home (o) in some country, according to the laws of which country his legal rights may be, in many respects, determined; but the rule that a child has from the moment of his birth the domicile of his father is clearly based upon fact, since an infant's home is, generally speaking, the home of his father.

Secondly.—The domicile of origin, though received at birth (p), need not be either the country in which the infant is born, or the country in which his parents are residing, or the country to which his father belongs by race or allegiance. "I speak," says an eminent Judge, "of the domicile of origin rather than of birth. I find no authority which gives, for the purpose of succession, any effect to the place of birth. If the son of an Englishman is born upon a journey his domicile will follow that of his father. The domicile of origin is that arising from a man's birth and connections" (q); *i.e.*, it is fixed by the domicile of the parent at the time of the child's birth. Thus D., the son of an Englishman, and a British subject, is born in France, where his father is residing for the moment, though domiciled without being naturalized in America. D.'s domicile of origin is neither English nor French, but American (r).

Domicil of origin, not country of birth or of nationality.

domicil and nationality by making a person's civil, no less than his political rights depend not on his domicile but on his nationality or allegiance. See *Codice Civile del Regno d'Italia*, Art. 6; *Bar.*, s. 30. 1 *Felix*, pp. 1—4; *Fiore*, ss. 42—47.

(o) See for cases of homelessness in fact, p. 48, *ante*.

(p) Or "as from birth."

(q) *Somerville v. Somerville*, 5 Vesey, 749a, 786, 787, *per Alvanley*, M. R.

(r) This may be a matter of great consequence to D., for supposing his father and mother to be unmarried at the time of his birth, the effect of their subsequent marriage, on D.'s legitimacy, will depend on the law of the country where D.'s father was domiciled at the time of D.'s birth. See *Re Wright's Trusts*, 2 K. & J. 595, 25 L. J. (Ch.) 621. Rule 35, p. 181, *post*.

1.—*Case of a Legitimate Infant.*

1. Legitimate infant.

A legitimate child born during his father's lifetime has his domicil of origin in the country where the infant's father is domiciled at the moment of the child's birth, for "the law attributes to every individual as soon as he is born the domicil of his father if the child be legitimate" (s).

A legitimate child, for example, is born at Boulogne at a moment when his father is domiciled in Scotland. The child's domicil of origin is Scotch.

2.—*Case of Illegitimate or Posthumous Infant.*

2. Illegitimate infant.

Such a child has for his domicil of origin the domicil of his mother at the time of his birth (t).

D. is an illegitimate child born in France at a time when his father, an Englishman, is domiciled in England, and his mother, a Frenchwoman, is domiciled in France. D.'s domicil of origin is not English but French (u).

D. is a posthumous child, whose father was domiciled at the time of death in England. At the time of D.'s birth his mother has acquired a domicil in France. D.'s domicil of origin is French (x).

3.—*Case of a Foundling.*

3. Foundling.

D. is a foundling, i.e., a child whose parents are unknown. He is found in Scotland. His domicil of origin is Scotch (y).

4.—*Case of a Legitimated Person.*

4. Legitimated person.

A person born illegitimate, but afterwards legitimated

(s) *Udny v. Udny*, L. R. 1 Sc. App. 441, 457, per Lord Westbury.

(t) See *Westlake*, s. 35.

(u) *Re Wright's Trusts*, 25 L. J. (Ch.) 621; 2 K. & J. 595.

(x) *Westlake*, s. 35. Authority (?)

(y) This is really rather a result of rules of evidence than a direct rule of law. See Rule 14, p. 116, *post*.

by the subsequent marriage of his parents, stands in the position (after his legitimation) which he would have occupied if he had been born legitimate. His domicile of origin is the country where his father was domiciled at the time of his birth. D. is the child of a Scotch father and an Englishwoman, who were unmarried at the time of his birth. At that moment the domicile of his father was Scotch, and of his mother English. On the marriage of his parents D. becomes, according to Scotch law, legitimated. D.'s domicile of origin is henceforth Scotch (z).

Domicil of Choice.

RULE 7.—Every independent person can acquire a domicile of choice, by the combination of residence (*factum*), and intention of permanent or indefinite residence (*animus manendi*), but not otherwise (a). Rule 7.
Domicil of
choice,
how
acquired.

It will be convenient to consider separately the meaning of, and the authorities for, first, the affirmative, secondly, the negative portion of the rule.

(z) *Udny v. Udny*, L. R. 1 Sc. App. 441.

Dalhousie v. McDouall, 7 Cl. & F. 817.

Munro v. Munro, *ibid.* 842.

Legitimatio per subsequens matrimonium is unknown to English law, but when it takes place under a foreign law its effect is for most purposes recognised by our courts. See Rule 35, p. 181, *post*.

(a) *Udny v. Udny*, L. R. 1 Sc. App. 441, 457, 458.

Bell v. Kennedy, *ibid.*, 307, 450.

Collier v. Rivaz, 2 Curt. 855.

Maltass v. Maltass, 1 Rob. Ecc. 67, 73.

Forbes v. Forbes, 23 L. J. (Ch.) 724, Kay, 341.

Haldane v. Eckford, L. R. 8 Eq. 631.

Hoskins v. Matthews, 25 L. J. (Ch.) 689; 8 De G. M. & G. 13.

Jopp v. Wood, 4 De G. J. & S. 616, 621, 622.

Story, n. 44.

Westlake, ss. 37—40.

Phillimore, ss. 203—210.

(i.) *Mode of acquisition.*

(1.) Acquisition by residence and *animus manendi*. Every person begins life as an infant, and therefore as a dependent person. When he becomes an independent person (which can in no case happen before he attains his majority) (b), he will find himself in possession of a domicile (c), which will in most cases be his domicile of origin (d).

He can then obtain for himself, by his own act and will, a legal home, or domicile different from the domicile of origin, and called a domicile of choice. This domicile is acquired by the combination of residence, and the intention to reside, in a given country.

"It may," it has been said, "be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention will establish a domicile" (e). The process by which this new domicile is acquired has been thus aptly described. "A change of" [the domicile of origin] "can only be effected *animo et facto*—that is to say, by the choice of another domicile evidenced by residence within the territorial limits to which the jurisdiction of the new domicile extends." [A person] "in making this change does an act which is more nearly designated by the word 'settling,' than by any one word in our language. Thus we speak of a colonist settling in Canada, or Australia, or of a Scotsman settling in England, and the word is frequently used as expressive

(b) It may happen later, *e.g.*, in the case of a woman who marries while an infant, and becomes a widow, late in life. The age of majority is fixed by English law at 21. By other laws, at other periods, *e.g.*, by Prussian law at 25. A question may arise, as to which no English decision exists, whether a person, *e.g.*, a Prussian of 22, will be considered by the English courts as capable of acquiring a domicile at the age of 21. It may be conjectured that the answer to this inquiry depends, in part at least, on the law of the country where he acquires a domicile. He might be held capable of acquiring an English domicile.

(c) See Rule 11, pp. 107—109, *post*.

(d) If it is not, it becomes immediately his domicile of choice by the process of acquisition described in the text.

(e) *Bell v. Kennedy*, L. R. 1 Sc. App. 307, 319, *per Lord Oranworth*.

"of the act of change of domicile, in the various judgments pronounced by our courts" (f). The acquisition in short of a domicile of choice, is nothing more than the technical expression for settling in a new home or country, and therefore involves the existence of precisely those conditions of act and intention, which we have seen to be requisite for the acquisition of a home (g).

"The only principle which can be laid down as governing all questions of domicile is this, that where a party is alleged to have abandoned his domicile of origin, and to have acquired a new one, it is necessary to show, that there was both the *factum* and the *animus*. There must be the act and there must be the intention" (h).

(f) *Udny v. Udny*, L. R. 1 Sc. App. 441, 449, per Lord Chelmsford.

(g) It may therefore be thought that the term domicile of choice is exactly equivalent to the ordinary expression home, as already defined (see p. 44, *ante*), but this is not the case. A domicile of choice is always a home, but a home is not always a domicile of choice. For the domicile of origin being imposed by a rule of law, is never considered as a domicile of choice; though as a matter of fact a person's domicile of origin is, in most instances, a person's actual home. So again a person's real home may not, in the eye of the law, be his domicile of choice, since he may be a person who, though in fact capable of choosing a home for himself, is legally incapable of such choice. Thus minors or married women often do choose homes for themselves, but as they are considered by law incapable of such choice, the home they have in fact chosen is not legally their domicile of choice.

Though again the legal conditions necessary for the acquisition of a domicile of choice are in substance the same as the conditions necessary for the acquisition of a home, these conditions are, for legal purposes, defined with technical precision. The legal theory further, that every one has a domicile of origin, which is, so to speak, presumably his home, leads to the result that the law requires stronger proof of deliberate intention to acquire a new domicile than would be demanded by any person who without reference to legal rules wished to determine whether D. had or had not left England and settled in Australia, and generally the courts, in judging whether a man has acquired a domicile of choice, look more to intention, and less to length of residence, than would popular judgment in inquiring whether he had acquired a new home. Thus it can hardly be doubted either that the decision in *Bell v. Kennedy* (L. R. 1 Sc. App. 307) is legally correct or that it is opposed to ordinary notions. A layman would probably have held that Mr. Bell had settled in Scotland.

(h) *Cockrell v. Cockrell*, 25 L. J. (Ch.) 780, 781, per *Kindersley*, V.-C.

"A new domicile is not acquired until there is not only "a fixed intention of establishing a permanent residence in "some other country, but until also this intention has "been carried out by actual residence there" (i).

It is in short admitted in general terms, that "the "question of domicile is a question of fact and intention" (k).

Particular attention therefore is due to the nature both of the requisite fact, viz., "residence," and of the requisite "intention."

(i.) Residence.

(i.) *Residence*.—The nature of residence considered as a part of domicile, and thus looked at as a physical fact, independently of the *animus manendi*, has been little discussed (l). It may be defined (as already suggested) as "habitual physical presence in a place or country." The word however "habitual," must not mislead. What is meant is not presence in a place or country for a length of time, but presence there for the greater part of the time, be it long or short, which the person using the term residence contemplates.

The residence which goes to constitute domicile, certainly need not be long in point of time. "If the intention of "permanently residing in a place exists, a residence in "pursuance of that intention, however short, will establish "a domicile." (m)

The residence must however be in pursuance of, or influenced by, the intention.

This characteristic, however, in common with other qualities which are generally ascribed to residence, concerns not the physical fact of residence, but the mental

(i) *Bell v. Kennedy*, L. R. 1 Sc. App. 307, 319, per Lord Chelmsford.

(k) *Attorney-General v. Kent*, 31 L. J. (Ex.) 391, 393, per Wilde, B. See also *Collier v. Rivaz*, 2 Curt. 855; *Maltass v. Maltass*, 1 Rob. Ecc. Rep. 67.

(l) It may be well to note again that residence is often used as including the *animus manendi*, and hence as equivalent to home or domicile. See, e.g., *King v. Foxwell*, 3 Ch. D. 518, 520, for expressions of Jessell, M. R., as to residence, where the term is clearly used as including the *animus manendi*, see p. 48, note (e), ante.

(m) *Bell v. Kennedy*, L. R. 1 Sc. App. 307, 319, per Lord Cranworth.

fact of the choice, purpose, or intention to reside (*animus manendi*).

(ii.) *Intention*.—The main problem in determining the nature of domicile (*o*), in so far as it depends upon choice, consists in defining the character of the necessary purpose, intention, or *animus*. The difficulty lies partly in the nature of the thing itself, partly in the different views which courts and writers have at different times entertained, as to the nature and definiteness of the requisite intention or purpose. The best definition or description of the requisite *animus*, appears to be, the present intention of permanent or indefinite residence in a given country, or (if the same thing be expressed more accurately, in a negative form) “the absence of any present intention of not residing permanently or indefinitely in a given country” (*p*). (ii.) Intention.

There exists no authoritative definition of the *animus manendi* necessary to the acquisition of a domicile of choice, but there are four points as to its character which deserve notice. Characteristics of intention.

First.—*The intention must amount to a purpose or choice*. (i.) Must amount to purpose.

“The domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular country. It must not be prescribed or dictated by any external necessity” (*q*). “In order that a man may change his domicile of origin he must choose a new domicile—the word ‘choose’ indicates that the act is voluntary on his part; he must choose a new domicile by fixing his sole or principal residence in a new country (that is, a country which is

(o) See *Definition of Domicil*, App., Note I.

(p) For the substance of this description, see *Story*, s. 43, and compare the language of Lord Cairns in *Bell v. Kennedy*, L. R. 1 Sc. App. 307, 318. See also judgment of *Martin, B., Attorney-General v. Kent*, 31 L. J. (Ex.) 391, 395, 396.

(q) *Udny v. Udny*, L. R. 1 Sc. App. 441, 458, per Lord Westbury. The word “voluntarily” may easily mislead. See pp. 78, 144—146, *post*.

"not his country of origin), with the intention of residing there for a period not limited as to time" (r).

The expression that the residence must be "voluntary," or a matter of choice, is not in itself a happy one, since supposing a person to make up his mind to settle in a country for an indefinite time, the "motive," whether it be economy, pleasure, or even considerations of health (s), is indifferent, though certainly the residence would not in some of these cases be termed, in ordinary language, a matter of choice. What, however, is intended to be expressed, and is undoubtedly true, is, that the residence must be connected with distinct purpose, or intention to reside. In this sense, therefore, there must be a residence of "choice." The mere fact, in other words of residence, however prolonged, has no effect on the acquisition of domicile, unless the residence is in consequence of an intention to reside. Hence, to take a familiar example—residence in a country, under imprisonment, or in consequence of detention arising from illness, as where D., domiciled in England, falls ill on a journey through France, and is delayed there from week to week, does not entail a change of domicile.

How far
must in-
tention be
conscious?

How far this intention or choice must be distinct or conscious is still an open question.

Some judges have held that it is not necessary, in order to establish a domicile, that a person should have absolutely made up his mind as to which of two countries is the place which he intends to make his permanent home.

"One word," says *Bramwell*, B., "with regard to the intention." [The counsel for the defendant] "says, and I think he errs there, that [D.] did not intend to remain in England, because he contemplated that he might

(r) *King v. Foxwell*, 8 Ch. D. 518, 520, per *Jessell*, M. R.

(s) See *Hoskins v. Matthews*, 25 L. J. (Ch.) 689; 8 De G. M. & G. 13, compared with the expression of Lord *Westbury* in *Udny v. Udny*, L. R. 1 Sc. App. 441, 458, which seems to imply that a domicile of choice must not be dictated by a desire for "relief from illness." See pp. 133—147, *post*.

"possibly go back to India. I think there is a very common mistake made in such cases, which is the assumption that a man must absolutely intend one of two things, for it may be that he has no absolute intention of doing either. It may be that [D.] did not contemplate the case at all arising of an opportunity of going back to India. So that, if he had been suddenly appealed to upon the subject, he might have said, 'I have never thought of it.' I think, however, it appears that he had contemplated the possibility of returning to India. But is it to be said that a contingent intention of that kind defeats the intention which is necessary to accompany the *factum*, in order to establish a domicile? Most assuredly not. There is not a man who has not contingent intentions to do something that would be very much to his benefit if the occasion arises. But if every such intention or expression of intention prevented a man having a fixed domicile, no man would ever have a domicile at all, except his domicile of origin" (u).

Others have laid down that a somewhat more distinct intention must exist. "It must," it has been said, "be shown that the intention required actually existed, or made reasonably certain that it would have been formed or expressed if the question," [whether a person intended to change his domicile] "had arisen in a form requiring a deliberate or solemn determination" (x).

The difference of view, however, is not, after all, great. It is granted on all hands that there must be a distinct *animus munendi*. It is further granted that, in the course of a long residence, a purpose to reside permanently or settle may grow up gradually and unconsciously (y). In any case a real intention must exist, but where the residence is long, less proof of the intention is required. The question about the degree of definiteness of purpose

(u) *Attorney-General v. Pottinger*, 30 L. J. (Ex.) 284, 291, 292, per Bramwell, B.

(x) *Douglas v. Douglas*, 11 R. 12 Eq. 617, 645, per Wickens, V.-C.

(y) See *Maltass v. Maltass*, 1 Rob. Ecc. 67, 73.

which is needed, refers rather to the evidence than to the nature of the intention.

(ii.) Must
be inten-
tion of per-
manent
residence.

Secondly.—The intention must be an intention to reside permanently, or for an indefinite period (z).

It must be—that is to say, not an intention to reside for a limited time or definite purpose, but “an intention of continuing to reside for an unlimited time” (a).

If, for example, D., domiciled in England, goes to America for six months, or to finish a piece of business, or even with the intention of staying there only until he has made a fortune (b), he retains his English domicile. Thus, a residence in a foreign country for twenty-five years (c) will not change a person's domicile in default of the intention of settling permanently or indefinitely in such foreign country; but it is, of course, “true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case, “as soon as the change of purpose or *animus manendi* can be inferred, the fact of domicile is established” (d). If D., who goes to America, intending to stay there for a limited

(z) It is maintained by an eminent writer (2 *Fraser, Husband and Wife*, 2nd ed., p. 1265) that a person cannot change his domicile unless he has the intention to change his civil status. This contention is, however, according to English law, erroneous, for it is clear that if D. leaves England for good and takes up his residence in France with the intention of residing there permanently he will, by our courts, be held to have acquired a French domicile, and this, even though he may wish to retain his status as an English citizen; nor is it easy to see how, on any view, a change of domicile can be made to depend on the intention to change a person's civil status. Most people, on leaving one country to reside in another, do not in fact either contemplate or understand the effect of such residence on their civil status. The doctrine, in fact, that a change of domicile cannot be effected without the intention to make a change of status, appears to be only a slightly different form of the doctrine deliberately rejected by the House of Lords, that a person cannot change his domicile unless he intends *quatenus in illo exuere patriam*.

(a) *Udny v. Udny*, L. R. 1 Sc. App. 441, 458, per Lord Westbury.

(b) *Jopp v. Wood*, 34 L. J. (Ch.) 212; 4 De G. J. & S. 616. See, however, *Doucet v. Geoghegan*, 9 Ch. D. 441.

(c) *Ibid.*

(d) *Udny v. Udny*, L. R. 1 Sc. App. 441, 458, per Lord Westbury.

period, after living there for a year or two, makes up his mind to reside there permanently, he at once acquires an American domicil.

Thirdly.—The intention must be an intention of ^{(iii.) Must be intention of abandoning existing domicil.} abandoning, i.e., of ceasing to reside permanently in, the former domicil.

"The intention must be to leave the place where the party has acquired a domicil, and to go to reside in some other place as the new place of domicil" (e). Indeed, if it be granted that a man can have but one domicil at the same time (f), it necessarily follows that the purpose or *animus* requisite for acquiring a domicil in France must exclude the purpose requisite for retaining a domicil in England.

Fourthly.—The intention need not be an intention to ^{(iv.) Need not be intention to change allegiance.} change allegiance (g).

The intention to reside permanently in a country, is not the same thing as the intention or wish to become a citizen of that country.

It was, indeed, at one time held, that a man could not change his domicil, for example from England to France, without doing at any rate as much as he could to become a Frenchman. He must, as it was said, "intend *quatenus in illo exuere patriam*" (h). But this doctrine has now been pronounced by the highest authority erroneous (i), and the law has been thus laid down:—

"It is universally, or all but universally, true, that in order to prove that the domicil of an adult of sound mind has been changed an intention on his part must be shown. The question on which opinions have differed is as to what he must be shown to have intended. According to one view, it is sufficient to show that he intended

(e) *Lyall v. Paton*, 25 L. J. (Ch.) 746, 749, per *Kindersley*, V.C.

(f) See Rule 3, p. 61, *ante*.

(g) See, however, p. 70, note (n), *ante*.

(h) *Moorhouse v. Lord*, 32 L. J. (Ch.) 295, 298; 10 H. L. C. 272, 283, per Lord Cranworth, followed by *In re Capdevielle*, 33 L. J. (Ex.) 306.

(i) See *Udny v. Udny*, L. R. 1 Sc. App. 441.

Brunel v. Brunel, L. R. 12 Eq. 298.

"to settle in a new country; to establish his principal or
 "sole and permanent home there, though the legal conse-
 "quences of so doing, on his civil *status*, may never have
 "entered his mind. According to the other view, it is
 "necessary to show that he intended to change his civil
 "*status*, to give up his position as, for the purposes of civil
 "*status*, a citizen of one country, and to assume a position
 "as, for the like purposes, the citizen of another. This
 "stricter view is supported by opinions of great weight,
 "amongst others by the Lord President in *Donaldson v.*
 "*McClure* (k); that of the Lord Chief Baron Pollock in
 "*Attorney-General v. Countess de Wahlstatt* (l), and by
 "some expressions used by the late Lords Cranworth and
 "Kingsdown. And it would be an extremely convenient
 "one, since if, for the purpose of showing that a man had
 "changed his domicile, it were necessary to show that the
 "notion of a change of the civil *status* had occurred to his
 "mind and been accepted by his will, the attempt would
 "in most cases fail. Few men think of or wish for a change
 "of civil domicile as such, except, perhaps, in certain cases
 "where a man desiring to change his political domicile
 "contemplates the change of civil domicile as involved in
 "it, and occasionally where the object of the change is
 "to escape into a freer condition of marriage law. And
 "cases like *Haldane v. Eckford* (m), where the change of
 "civil *status* can be shown to have been recognised and
 "accepted by a person who had no special reason to desire
 "it . . . are very rare indeed. The stricter rule
 "would, therefore, in the great majority of cases, leave
 "the domicile to be governed by origin, which, it seems
 "to me, would be in every respect a convenient view.
 "In this case, if I considered the stricter rule as law, I
 "should have no difficulty whatever in holding that the
 "testator never changed his domicile. I feel sure that the

(k) 20 Court of Sess. cases (2nd series), 307.

(l) 3 H. & C. 374.

(m) L. R. 8 Eq. 631.

"idea of changing his civil *status* from that of a Scotch-man, under Scotch law, to that of an Englishman, under English law, never occurred to him, and that if it had occurred to him he would have repudiated it. Probably the question as to his eldest son's legitimacy would of itself have been conclusive on this point.

"But I cannot satisfy myself that the stricter rule, as I have called it, can be considered as the law of England. It never was I believe the law of any other country, except perhaps Scotland, or recognised as law by any of the text writers of European authority who have dealt with questions of domicile, and it is difficult to believe that the law of England has drifted so far from the general principles on which it professed to be founded and which it always professed to follow. It seems to me, as it did to Vice-Chancellor James in *Haldane v. Eckford* (n), that the intention required for a change of domicile, as distinguished from the action embodying it, is an intention to settle in a new country as a permanent home, and that if this intention exists and is sufficiently carried into effect certain legal consequences follow from it, whether such consequences were intended or not, and perhaps even though the person in question may have intended the exact contrary" (o).

(ii.) *No other mode of acquisition.*

The concurrence of residence and intention, for however short a time, is essential for the acquisition of a domicile.

(ii.) No acquisition without residence and intention.

"We are all agreed," it has been said, "that to constitute a domicile, there must be the fact of residence . . . and also a purpose on the part of [D.] to have continued that residence. While I say that both must concur, I say it with equal confidence that nothing else is necessary" (p). With reference to the circumstances of a particular case the principle has been thus stated:—

(n) L. R. 8 Eq. 631.

(o) *Douglas v. Douglas*, L. R. 12 Eq. 617, 644, per *Wickens*, V.C.

(p) *Arnott v. Groom*, 1846, 9 D. 142, per Lord *Jeffrey*.

"I cannot but think, that all the facts with respect to "the abandonment of the old domicile, and the acquisition "of a new one, indicate not only an intention [on D.'s part] "to reside at Brussels, and make that place his home, but "that the fact and the intention concur together, which is "all that is necessary to constitute a domicile. Length of "time will not alone do it, intention alone will not do it, "but the two taken together do constitute a change of "domicil. No particular time is required, but when the "two circumstances of actual residence, and intentional "residence concur, there it is that a change of domicile is "effected" (q).

"Residence" alone, clearly will not suffice.

This is sufficiently apparent from the ordinary case of persons travelling, or living abroad, who retain a home in a country they may not have seen for years (r).

"Intention" alone will not suffice.

D., who has never resided in Australia, will clearly not acquire a domicile there by the mere intention to reside there.

Nor will the fact, that D. has set forth from England on his voyage to Australia, give him an Australian domicile until he arrives there.

This must be noticed, because it was at one time thought (s), that a new domicile could be acquired *in itinere*, i.e., that if D. left England, intending to settle, e.g., in Australia, he acquired an Australian domicile the moment he quitted England (t). But this notion has now been rejected by the highest authorities, and the principle is completely established, that a domicile of choice is acquired by nothing short of the concurrence of residence and intention.

From the fact that the acquisition of a domicile of choice depends solely on the co-existence of the two facts of

(q) *Collier v. Rivaz*, 2 Curt. 855, 857, per Sir H. Jenner *Fust.* See also *Udny v. Udny*, L. R. 1 Sc. App. 441, 450.

(r) See further for cases where there is no change of domicile, because there is residence without the *animus manendi*, pp. 125—140, *post*.

(s) See expressions of *Leach*, V. C., in *Munroe v. Douglas*, 5 Madd. 379, 405.

(t) See further Rule 8, p. 86, *post*.

residence and intention to reside, two important results may be deduced.

First.—A person's wish to retain a domicile in one country will not enable him to retain it if, in fact, he resides with the *animus manendi* in another. (1.) Domicil not retained by mere wish to retain it.

D., originally a domiciled Englishman, resided at Hamburg with the intention of living there for an indefinite period. He wished, however, to retain his English domicile, and coming for a temporary purpose to England made a will there, in which he declared his intention not to renounce his English domicile of origin. He then returned to Hamburg, and continued living there with the *animus manendi* till his death. D. had at the time of his death, a domicile at Hamburg, and not in England (x).

"I consider the declaration of the testator as meaning "that he intended to go back to Hamburg to live and die "there, though it was not his intention of never coming to "England again. Probably he wished for two domicils. But "in spite of a lurking desire to return to England, his acts "show an intention to live and die at Hamburg, and that "is not affected by the declaration. . . . That being "so, he *could not help giving up* his English domicile" (y). "The testator does not say that he had no intention of remaining at Hamburg during his life, but only that he "wished to retain his English domicile. That he could not "do" (z).

Secondly.—The acquisition of a domicile cannot be affected by rules of foreign law. (2.) Domicil not affected by rules of foreign law.

By the law of some countries, *e.g.*, of France, a person is required to fulfil certain legal requirements, before he is considered by the French courts to be domiciled in France (a), but if a person in fact resides with the *animus*

(x) *Re Steer*, 3 H. & N. 594, 28 L. J. (Ex.) 22.

(y) *In re Steer*, 3 H. & N. 594, 599, *per Pollock*, C.B.

(z) *Ibid.*, *per Bramwell*, B.

(a) *Bremer v. Freeman*, 10 Moore P. C. 306.

Collier v. Rivas, 2 Curt. 855.

Hamilton v. Dallas, 1 Ch. D. 257.

manendi in France, he will be considered by our courts to be domiciled there, even though he has not complied with the requirements of French law.

D., an English peer, lives in France, and as a matter of fact intends to pass the rest of his life in France. He wishes, however, to retain a domicile in England. He occasionally exercises political rights there, and always describes England in formal documents as his domicile. D. is domiciled in France (c).

This principle must of course be restrained to the legal requirements of *foreign* law (d). If an English statute required that a person should, in order to be domiciled in a country, perform certain legal conditions, such as depositing a declaration with an official of his intention to become domiciled therein, the rule laid down by the statute would, like any other part of English law, be applied by our courts. This matter deserves consideration, because under 24 & 25 Vict. c. 121 (e), the Crown has power to enter into a treaty with any foreign state, the effect of which if made, *e.g.*, with France would be that for purposes of testate or intestate succession a British subject could not acquire a domicile in France or a French subject acquire a domicile in the United Kingdom without having fulfilled the legal conditions as to a declaration and otherwise required by the Act.

Change of Domicil.

Rule 8.

RULE 8.—

Domicil of origin and choice how changed.

- (1) The domicile of origin is retained until a domicile of choice is in fact acquired (f).

(c) *Hamilton v. Dallas*, 1 Ch. D. 257.

(d) See, however, as to the possible effect of the Indian Succession Act, 1865, on a person's domicile, the Scotch case, *Wauchope v. Wauchope*, 23 June, 1877, 4 R. 945.

(e) See p. 65, *ante*, and *Foreign Wills Acts*, App., Note.

(f) *Udny v. Udny*, L. R. 1 Sc. App. 441; *Bell v. Kennedy*, *ibid.* 307.

- (2) A domicile of choice is retained until it is abandoned (*g*), whereupon either
- (i) a new domicile of choice is acquired;
 - or,
 - (ii) the domicile of origin is resumed.

An independent person retains a domicile in a country where he has once acquired it until he has (in the strict sense of the term abandonment) abandoned (*h*) that country by giving up not only his residence there, but also his intention to reside there, or to use untechnical language, until he has left the country for good. But though a domicile is never changed without actual abandonment of an existing domicile the legal effect of a man's having left a country where he is domiciled for good, differs according as the domicile is a domicile of origin or a domicile of choice.

"Everyone's domicile of origin must be presumed to (1.) Domicil of
 "continue, until he has acquired another sole domicile by origin
 "actual residence, with the intention of abandoning his retained
 "domicil of origin. This change must be *animo et facto*, till domicil of
 "and the burden of proof unquestionably lies on the party choice
 "who asserts the change" (*h*). "It is a clear principle of actually
 "law, that the domicile of origin continues until another acquired.
 "domicil is acquired, *i.e.*, till the person whose domicile is in
 "question, has made a new home for himself in lieu of the
 "home of birth" (*i*).

The meaning of these expressions is that a domicile of origin cannot be simply abandoned. If D. is in possession of an English domicile of origin, he may indeed in fact abandon England as his home without in reality settling

(*g*) *Udny v. Udny*, L. R. 1 Sc. App. 441; *Bell v. Kennedy*, *ibid.* 307.

(*h*) See p. 46, 47, *ante*.

(*h*) *Aikman v. Aikman*, 3 Macq. 854, 877, *per* Lord Westbury.

(*i*) *Ibid.*, p. 863, *per* Lord Cranworth.

elsewhere, but in the eye of the law he cannot give up or get rid of his domicile of origin until he has in fact changed it for another, by settling in another country. Though in reality homeless he will, until he settles elsewhere, be considered to have his legal home or domicile in England.

D., the descendant of a Scotch family, had a domicile of origin in Jamaica. After he came of age he sold his estates in Jamaica and left the island, to use his own expression, for good. He then went to Scotland and remained there for some time without making up his mind whether to settle in Scotland or not. The Court of Session held that D. had acquired a Scotch domicile, but the House of Lords reversed their decision, and held that D. remained domiciled in Jamaica. The law on the subject was laid down by their Lordships in the following terms:—

“What appears to me to be the erroneous conclusion at which the Court of Session arrived is in great part due to the circumstance, frequently lost sight of, that the domicile of origin adheres until a new domicile is acquired. In the argument, and in the judgments, we find constantly the phrase used that he had abandoned his native domicile. That domicile appears to have been regarded as if it had been lost by the abandonment of his residence in Jamaica. Now, residence and domicile are two perfectly distinct things. It is necessary in the administration of the law that the idea of domicile should exist, and that the fact of domicile should be ascertained, in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties. We know very well that succession and distribution depend upon the law of the domicile. Domicile, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place. Now this case was argued at the Bar on the footing, that as soon as” [D.] “left Jamaica he had a settled and fixed intention of taking up his residence in Scotland.

“And if, indeed, that had been ascertained as a fact, then
 “you would have had the *animus* of the party clearly
 “demonstrated, and the *factum*, which alone would remain
 “to be proved, would in fact be proved, or, at least, would
 “result immediately upon his arrival in Scotland.”

“The true enquiry, therefore, is—Had he this settled
 “purpose, the moment he left Jamaica, or in the course of
 “the voyage, of taking up a fixed and settled abode in
 “Scotland? Undoubtedly, part of the evidence is the ex-
 “ternal act of the party; but the only external act we have
 “here is the going down with his wife to Edinburgh, the
 “most natural thing in the world, to visit his wife’s relations.
 “We find him residing in Scotland from that time; but
 “with what intention his residence continued there we have
 “yet to ascertain. For although residence may be some
 “small *prima facie* proof of domicile, it is by no means to be
 “inferred from the fact of residence that domicile results,
 “even although you do not find that the party had any
 “other residence in existence or in contemplation. I take
 “it that” [D.] “may be more properly described by words
 “which occur in the Digest; that when he left Jamaica he
 “might be described as *quærens, quo se conferat, atque*
 “*ubi constituat domicilium* (k). Where he was to fix his
 “habitation was to him at that time a thing perfectly un-
 “resolved; . . . The question is, had he any settled
 “fixed intention of being permanently resident in Scotland
 “on the 28th September, 1838? . . . It is impossible
 “to predicate of him that he was a man who had a fixed
 “and settled purpose to make Scotland his future place of
 “residence, to set up his tabernacle there, to make it his
 “future home. And unless you are able to show that with
 “perfect clearness and satisfaction to yourselves, it follows
 “that the domicile of origin continues. And therefore I think
 “we can have no hesitation in answering the question where
 “he was settled on the 28th September. It must be

(k) Dig. lib. 50, t. 1, 27.

"answered in this way: he was resident in Scotland, but
 "without the *animus manendi*, and therefore he still
 "retained his domicile of origin" (*m*).

(2.) Domicil of choice retained till abandonment when

A domicile of choice, or a home is retained (*n*), until both residence (*factum*) and intention to reside (*animus*), is in fact given up, but when once both of these conditions have ceased to exist, it is abandoned as well in the eye of the law as in fact.

Of the principle, that a domicile of choice is retained until actual abandonment, the following case affords a good illustration:

D., a widow, whose domicile of origin was English, acquired by marriage a domicile in France. After her husband's death she determined to return to England as her home. She went on board an English steamer at Calais, but was seized with illness, *and before the vessel left the harbour*, re-landed in France, where after some months (though wishing to return to England) she died having been unable on account of ill-health to leave France. D. retained her French domicile. "I cannot think," it was laid down, "that there was a sufficient act of abandonment, "as long as the deceased remained within the territory of "France, her acquired domicile" (*o*).

The case is an extreme one, and the court were not without hesitation as to the question whether D. had or had not resumed her English domicile. The case, however, is correctly decided, and exactly illustrates the principle that a domicile of choice is retained, until actual residence in a country is brought to an end. So, again, if D., an

(*m*) *Bell v. Kennedy*, L. R. 1 Sc. App. 307, 320, 321, 322, *per Lord Westbury*. This principle, it may be well to remark, equally applies, whether D.'s domicile of origin be one which he has never lost, or one which he has changed, and then resumed; in either case it is, in the eye of the law, retained until he has actually acquired and is in possession of a domicile of choice.

(*n*) See pp. 50, 51, *ante*.

(*o*) *In goods of Raffeneil*, 32 L. J. (P. & M.) 203, 204, *per Sir C. Cresswell*.

Englishman, who has acquired a domicile of choice in Germany returns for a time to England, but retains the intention to reside permanently in Germany, he does not lose his German domicile (*p*). To use, in short, technical language, the domicile of choice is retained, either *facto* or *animo*.

The principle, on the other hand, that actual abandonment of such a domicile puts an end to its existence, not only in fact, but in the eye of the law, has been judicially stated in the following terms :

"It seems reasonable to say, that if the choice of a new abode and actual settlement there constitute a change of the original domicile, then the exact converse of such a procedure, viz., the intention to abandon the new domicile, and an actual abandonment of it, ought to be equally effective to destroy the new domicile. That which may be acquired may surely be abandoned" (*q*).

The abandonment of one domicile of choice may, as a (i.) either matter of fact, coincide with the acquisition of another (*r*). ^{a new domicile of choice is acquired, or} D., for example, whose domicile of origin is English, has acquired a domicile of choice in France. He goes to Germany, intending to reside there for a short time, and therefore on arriving in Germany, still retains his French domicile of choice, but after residing in Germany for some time, he makes up his mind to reside there permanently. At that moment, both his French domicile of choice is abandoned, and a German domicile of choice is acquired.

So far there is no difference between a domicile of origin and a domicile of choice; either may be abandoned, simultaneously with the actual acquisition of another domicile.

(*p*) *Re Steer*, 28 L. J. (Ex.) 22, 3 H. & N. 594.

(*q*) *Udny v. Udny*, L. R. 1 Sc. App. 441, 450, *per Hatherley*, C.

(*r*) See p. 50, *ante*.

(ii.) the
domicil of
origin is
resumed.

A person in possession of a domicil of choice, may abandon it, and at the same moment, in actual fact, resume his domicil of origin. This case presents no peculiarity, and is, in its essential features, exactly like the case already considered, of D.'s in fact abandoning one home or domicil of choice simultaneously with the acquisition of another.

But another state of circumstances is possible. A person may, as a matter of fact, abandon a home and domicil of choice in one country without in fact acquiring a home in another (s).

D., for example, whose domicil of origin is English, has an acquired home or domicil of choice in France. He leaves France for good without any intention of returning to England or of settling in any country whatever. He is in fact homeless. As, however, no one can in the eye of the law be without a domicil (t), it is a matter of logical necessity, that in order to give D. a domicil, one of two fictions should be adopted.

It might, in the first place be held, that in the case of an acquired, as of an original domicil, any existing domicil was retained, until another was actually acquired; or, to take D.'s particular case, that D. retained his French domicil, until he in fact settled in some other country. This view, however, which was at one time adopted by our courts (u) is now rejected (v).

It might, in the second place, be held, that on the simple abandonment of a domicil of choice, the domicil of origin is by a rule of law at once resumed or re-acquired, and this is the view now adopted by English tribunals.

D., for example, when he leaves France for good, without any intention of settling elsewhere immediately re-acquires his English domicil. For the true doctrine is, that the domicil of origin reverts from the moment that the domicil of choice is given up. "This is a necessary

(s) See p. 48, *ante*.

(t) See Rule 2, p. 59, *ante*.

(u) See *Munroe v. Douglas*, 5 Madd. 379.

(v) See p. 95, *post*.

"conclusion, if it be true that an acquired domicil ceases entirely whenever it is intentionally abandoned, and that a man can never be without a domicil. The domicil of origin always remains, as it were, in reserve, to be resorted to in case no other domicil is found to exist" (x).

Hence, whenever a person in fact abandons a domicil of choice, without actually acquiring a new domicil of choice, his domicil of origin is always resumed; for either he resumes it in fact, or if he does not do so in fact, he is assumed by a rule of law to resume or re-acquire it.

The precise difference in this matter between a domicil of origin and a domicil of choice, may be seen from the following illustration:

An Englishman whose domicil of origin is English, and a Frenchman whose domicil of origin is French, are both domiciled in England, where the Frenchman has acquired a domicil of choice. They leave England together, with a view to settling in America, and with the clearest intention of never returning to England. At the moment they set sail, their position is in matter of fact exactly the same; they are both persons who have left their English home, without acquiring another. In matter, however, of law, their position is different; the domicil of the Englishman remains English, the domicil of the Frenchman becomes French. The Englishman retains his domicil of origin, the Frenchman abandons his domicil of choice, and re-acquires his domicil of origin. If they perish intestate on the voyage, the succession (y) to the moveables of the Englishman will be determined by English law, the succession to the moveables of the Frenchman, will be determined by French law. The Englishman will be considered to have his legal home in England, whilst the Frenchman will be considered to have his legal home in France.

The distinction pointed out in the rule between a domicil of origin and a domicil of choice is fully borne out by decisions, and has been happily explained by judicial dicta.

(x) *Udny v. Udny*, L. R. 1 Sc. App. 441, 454, *per Lord Chelmsford*.

(y) See Rule 66, p. 291, *post*.

D.'s domicile of origin was Scotch. He settled in England, then abandoned England as his home, and went to reside at Boulogne without becoming domiciled in France. Under these circumstances, it was held that D. resumed his Scotch domicile of origin at the moment when he left England (y), and the law was thus laid down :

"The appellant contends that when once a new domicile is acquired, the domicile of origin is obliterated, and cannot be re-acquired more readily, or by any other means than those by which the first change of the original domicile is brought about, namely, *animo et facto*. He relied for this proposition on the decision in *Munroe v. Douglas* (z), where *Sir John Leach* certainly held that a Scotsman, having acquired an Anglo-Indian domicile, and having finally quitted India, but not yet having settled elsewhere, did not re-acquire his original domicile, saying expressly, 'I can find no difference in principle between an original domicile and an acquired domicile.' That he acquired no new domicile may be conceded, but it appears to me that sufficient weight was not given to the effect of the domicile of origin, and that there is a very substantial difference in principle between an original and an acquired domicile. I shall not add to the many ineffectual attempts to define domicile. But the domicile of origin is a matter wholly irrespective of any *animus* on the part of its subject. He acquires a certain *status civilis*, as one of your Lordships has designated it, which subjects him and his property to the municipal jurisdiction of a country which he may never even have seen, and in which he may never reside during the whole course of his life, his domicile being simply determined by that of his father" (a). "Domicil of choice, as it is gained," said Lord Westbury, "*animo et facto*, so it may be put an end to in the same manner. Expressions are found in some books, and in one or two cases, that the first or existing domicile remains until another is acquired.

(y) *Udny v. Udny*, L. R. 1 Sc. App. 441.

(z) 5 Madd. 379.

(a) *Udny v. Udny*, L. R. 1 Sc. App. 441, 448, per *Hatherley*, L. Ch.

" This is true if applied to the domicile of origin, but cannot
 " be true if such general words were intended (which is not
 " probable) to convey the conclusion, that a domicile of choice,
 " though unequivocally relinquished and abandoned, clings,
 " in despite of his will and acts, to the party, until another
 " domicile has *animo et facto* been acquired. The cases to
 " which I have referred are, in my opinion, met and con-
 " trolled by other decisions. A natural born Englishman
 " may, if he domiciles himself in Holland, acquire and have
 " the *status civilis* of a Dutchman, which is of course
 " ascribed to him in respect of his settled abode in the land,
 " but if he breaks up his establishment, sells his house and
 " furniture, discharges his servants, and quits Holland,
 " declaring that he will never return to it again, and taking
 " with him his wife and children for the purpose of travel-
 " ling in France or Italy in search of another place of
 " residence, is it meant to be said that he carries his
 " Dutch domicile, that is, his Dutch citizenship, at his
 " back, and that it clings to him pertinaciously until he
 " has finally set up his tabernacle in another country?
 " Such a conclusion would be absurd; but there is no
 " absurdity and, on the contrary, much reason, in holding
 " that an acquired domicile may be effectually abandoned
 " by unequivocal intention and act; and that when it is
 " so determined the domicile of origin revives until a new
 " domicile of choice be acquired. According to the *dicta* in
 " the books and cases referred to, if the Englishman
 " whose case we have been supposing lived for twenty
 " years after he had finally quitted Holland, without
 " acquiring a new domicile, and afterwards died intestate,
 " his personal estate would be administered according to
 " the law of Holland, and not according to that of his
 " native country. This is an irrational consequence of
 " the supposed rule. But when a proposition supposed
 " to be authorized by one or more decisions involves absurd
 " results, there is great reason for believing that no such
 " rule was intended to be laid down" (b).

(b) *Udny v. Udny*, L. R. 1 Sc. App. 441, 458, 459, per Lord Westbury.

This rule applies only to the domicil of independent persons. An infant, for example, may lose his domicil of origin, without, in fact, acquiring a home in any country.

Thus D. is the infant son of M., whose domicil of origin is English. At D.'s birth, M. is domiciled in France. D.'s domicil of origin is therefore French (*b*). M. leaves France for good, taking D. with him, and intending to settle in America. During the voyage across the Atlantic, M.'s domicil (*c*) and therefore D.'s is English; but D. has never resided in England, and is, in fact, homeless. D. therefore has changed his domicil of origin without the acquisition of a home in any country

It is easy to work out a similar result in the case of a wife.

*B.—Domicil of Dependent Persons (Infants,
Married Women.)*

Rule 9. Rule 9.—The domicil of every dependent person is the same as, and changes (if at all) with, the domicil of the person on whom he is, as regards his domicil, legally dependent (*d*).

Dependent
person
has domi-
cil of
person on
whom
dependent.

The general principle here stated is, that a person not *sui juris*, such as an infant or a wife, has the domicil of the person on whom he or she is considered by law to be, as regards at any rate the power of changing his or her legal home, dependent.

The words, "if at all," should be noticed. They are intended to meet the position of a dependent person whose domicil cannot at the moment be changed at all. Such is the position of an infant without parents or guardians. He cannot change his domicil himself, for he is not independent. It cannot at the moment be changed for him, because there is no person in existence on whom he is legally dependent.

(*b*) See Rule 9, p. 96, and Sub-Rule 1, p. 97, *post*.

(*c*) See pp. 92, 95, *ante*.

(*d*) For a general statement of this principle, see *Savigny*, s. 353, p. 56.

The operation of this general rule is seen from the resulting sub-rules.

SUB-RULE 1.—Subject to the exceptions herein-after mentioned, the domicile of an infant is during infancy determined as follows :

Domicil of
infant.
How
changed.

- (1.) The domicile of a legitimate or legitimated infant is, during the lifetime of his father, the same as, and changes with, the domicile of his father (*d*).
- (2.) The domicile of an illegitimate infant or of an infant whose father is dead, is, during the lifetime of the infant's mother, the same as, and changes with, the domicile of the mother (*e*).
- (3.) The domicile of an infant without living parents, or of an illegitimate infant without a living mother, possibly is the same as, and changes with, the domicile of his guardian (?) (*f*).

A child's domicile during infancy changes while the father is alive with the domicile of the father.

1. Case of
legitimate
infant.

D. is the legitimate son of a domiciled Englishman, and is himself born in England. When D. is ten years old his father emigrates to America, and settles there. D. is left at school in England. D. thereupon acquires an American domicile (*g*).

(*d*) *Somerville v. Somerville*, 5 Ves. 749a.

Sharpe v. Crispin, L. R. 1 P. & D. 611.

Forbes v. Forbes, 23 L. J. (Ch.) 724, 726, 727.

(*e*) *Pottinger v. Wightman*, 3 Mer. 67. See also the American cases, *Holyoke v. Hoskins*, 5 Pick. 20; *School Directors v. James*, 2 Watts and Sargent, 567; *Ryall v. Kennedy*, 40 N. Y. (S. C.) 347, 361; and the Scotch case, *Arnott v. Groom*, 1846, 9 D. 142. See *Wharton*, s. 41a.

(*f*) *Sharpe v. Crispin*, L. R. 1 P. & D. 611.

(*g*) See especially *Ryall v. Kennedy*, 40 N. Y. (S. C.) 347, 360.

D. is the infant son of Scotch parents, domiciled in Scotland, who marry after D.'s birth. D. is thereby legitimated. His father then, while D. is still an infant, acquires an English domicil. D.'s domicil thereupon becomes English (*i*).

2. Case of illegitimate infant, or

i. There is no doubt that during infancy, the domicil of an illegitimate infant is the same as, and (subject to the possible effect of Exception 1 (*k*)) changes with, the domicil of his mother.

D. is the illegitimate son of a domiciled Englishman, and a Frenchwoman domiciled at the time of D.'s birth in England (*l*). The mother, when D. is five years old, goes to France, and resumes her original French domicil. D. acquires a French domicil (*m*).

of an infant whose father is dead.

ii. There was at one time a doubt, whether after the death of the father, the children remaining under the care of the mother, followed her domicil or retained that which their father had, at the time of his death until the end of their minority. The case, however, of *Pottinger v. Wightman* (*n*) must now "be taken to have conclusively settled "the general doctrine," that (subject at any rate to the exceptions hereinafter mentioned) "if after the death of "the father an unmarried infant lives with its mother, and "the mother acquires a new domicil, it is communicated to "the infant" (*o*).

Questions as to effect of widow's change of domicil on that of children.

Difficult questions may, however, be raised, as to the effect of a widow's change of domicil on that of her children, where she is not their guardian. Such questions may refer to the two different cases of infants who reside, and of infants who do not reside, with their mother.

(*i*) Conf. *Udny v. Udny*, L. R. 1 Sc. App. 441.

(*k*) See p. 102, *post*.

(*l*) See as to England being D.'s domicil of origin, Rule 6, p. 69, *ante*.

(*m*) *Forbes v. Forbes*, 23 L. J. (Ch.) 724.

(*n*) 3 Mer. 67.

(*o*) *Johnstone v. Beattie*, 10 Cl. & F. 42; *per* Lord Campbell. See *Philimore*, ss. 115—119.

First.—Suppose that an infant resides with his mother who is not his guardian. The question may be raised, whether the domicile of the infant is determined by that of the mother, or by that of the guardian. No English case decides the precise point, but it may be laid down with some confidence, that (even if a guardian can in any case change the domicile of his ward) yet the domicile of a child living with his mother, whilst still a widow, will be that of the mother and not of the guardian (*p*). First question.

Secondly.—Suppose that an infant resides away from his mother, who is not his guardian. The question whether it is on his mother, or his guardian that the change of the child's domicile depends, presents some difficulty. In the absence of decisions on the subject, it is impossible to give any certain answer to the inquiry suggested. It is quite possible, that whenever the point calls for decision, the courts may hold that there are circumstances under which an infant's domicile must be taken, even in the lifetime of the mother, to be changed by the guardian. Second question.

These questions, and others of a similar character, really raise the general inquiry, whether as a matter of law, an infant's domicile is identified with that of the infant's widowed mother, to the same extent to which it is identified with that of his father during the father's lifetime?

It may be doubted, whether the courts would not under several circumstances hold, that an infant, in spite of a change of domicile on the part of the child's mother, retained the domicile of his deceased father. Still in general the rule appears to hold good that the domicile of an infant whose father is dead changes with the domicile of the child's mother.

D. is the son of a person domiciled in Jersey. When D. is ten years old his father dies. D.'s mother leaves Jersey, taking D. with her, and settles and acquires a

(*p*) See American cases, *Ryall v. Kennedy*, 40 N. Y. (S. C.) 347; *Holyoke v. Hoskins*, 5 Pick. 20; *School Directors v. James*, 2 Watts & S. 568.

domicil in England. D. thereupon acquires an English domicil (*q*).

3. Domicil
of an
infant
without
living
parents.

It is possible that the domicil of an orphan follows that of his guardian (*r*), but whether this be so or not is an open question.

In the first place, it may be doubted, whether the rule is not rather, that a ward's domicil can be changed, in some cases, by his guardian, than that it follows the domicil of his guardian. It is difficult to believe, that the mere fact of D.'s guardian acquiring for himself a domicil in France, can deprive D., the son of a domiciled Englishman, of his English domicil.

In the second place, the power of a guardian to change at all the domicil of his ward is doubtful. In the one recorded English case on the subject (*s*), the guardian was also the mother of the children. As a matter of common sense, it can hardly be maintained that the home of a ward, is in fact or ought to be as a matter of convenience identified with the home of his guardian, in the same way in which the home of a child is naturally identified with that of his father. Should the question ever arise, it will probably be held, that a guardian cannot (*t*) change the domicil of his ward, and almost certainly that he cannot

(*q*) See *Potinger v. Wightman*, 3 Mer. 67.

How would it have been if

(1) D.'s mother had not actually taken D. with her to England?

(2) D.'s mother had settled out of the United Kingdom, *e.g.*, at New York?

(3) D.'s mother had not been also his guardian?

These are questions which in the absence of decisions do not admit of an absolutely certain answer.

(*r*) See *Westlake*, a. 36.

(*s*) *Potinger v. Wightman*, 3 Mer. 67.

(*t*) "It seems doubtful whether a guardian can change an infant's domicil. The difficulty is that a person may be guardian in one place "and not in another." *Douglas v. Douglas*, L. R. 12 Eq. 617, 625, *per Wickens*, V.C.

See as to the position of a guardian, Rules 28—30, pp. 172—176, *post*.

do this, unless the ward's residence is as a matter of fact that of the guardian (*u*).

M D. is the orphan son of a domiciled Englishman. M. is D.'s guardian. M. takes D. to reside in Scotland, where *2c* *N* himself settles and acquires a domicile. D. possibly acquires a Scotch domicile (?).

The rule as to an infant's domicile may, perhaps, be extended to the domicile of an adult, who, though he has attained his majority, has never attained sufficient intellectual capacity to choose a home for himself. From the language used by the court in one case, it would appear that such a person may be considered to occupy a condition of permanent infancy. Domicil of adult not attaining intellectual capacity.

D., in the case referred to, was the son of an Englishman domiciled in Portugal. "There never was a period" [when D., though he attained his majority,] "could think and act for himself in the matter of domicile otherwise than as a minor could" (*x*). After D. became of age his father acquired an English domicile. Under these circumstances, the effect of the father's change of domicile had to be considered, and the law on the subject was thus laid down.

"I am assuming that [D.] was of unsound mind throughout his majority,—in other words, that there never was a period during which he could think and act for himself in the matter of domicile otherwise than as a minor could. "And if this be so, it would seem to me that the same reasoning which attaches the domicile of the son to that of

(*u*) On the continent it is generally held, that the minor's domicile is fixed by the father's death, and cannot be changed during minority, by the mother or guardian, except by act of law. The preponderating opinion in England and America, is, that such a change by a surviving parent, will be sustained by the courts, when it is made reasonably and in good faith. *Wharton*, s. 41a; and see American cases, *School Directors v. James*, 2 Watts & S. 568; *Holyoke v. Hoskins*, 5 Pick. 20; *White v. Howard*, 52 Barb. 294. The only English case is *Pottinger v. Wightman*, 3 Mer. 67. It does not appear to be approved by *Story*, s. 506, note 1, and on the whole I have considerable doubt whether the continental rule will not be ultimately maintained by our courts.

(*x*) *Sharpe v. Crispin*, L. R. 1 P. & D. 611, 618.

"his father while a minor would continue to bring about the same result, after the son had attained his majority, if he was continuously of unsound mind. The son in this case continued under the control of his father, was presumably supported by him, and, if he had not already been in England, when his father returned hither in 1843, would, it may reasonably be presumed, have been brought with him. At no period could he, according to the hypothesis [that he was continuously of unsound mind] have acted for himself in choosing a domicile, and if his next of kin and those who had the control of his movements and life were not capable of changing his domicile, that domicile would, from the moment of his majority, have become indelible. The better opinion, in my judgment, is, that the incapacity of minority never having in this case been followed by adult capacity, continued to confer upon the father the right of choice in the matter of domicile for his son, and that in 1843, . . . that right was exercised by the adoption of an English domicile for himself which drew with it a similar domicile for his "son" (y).

The extension of the general rule applies only to persons of continuously unsound mind. If a son on attaining his majority enjoys a period of mental capacity, he can acquire a domicile for himself. Whether, if he became incapable, his acquired domicile could be changed, is a matter of doubt. The question in his case, is the same as the inquiry which is hereafter considered (z), how far the domicile of a lunatic can be changed during lunacy.

Re-marriage of mother.

Exception 1 to Sub-Rule.—The domicile of an infant is not changed by the marriage of the infant's mother (a).

(y) *Sharpe v. Crispin*, L. R. 1 P. & D. 611, 618, judgment of Sir J. P. Wilde. The case is not decisive, as the court held, that if the son was capable of choosing a domicile he had, as a matter of fact, chosen that of his father.

(z) See Rule 19, p. 125, *post*, and pp. 130—133, *post*.

(a) See Amer. case, *Ryall v. Kennedy*, 40 N. Y. (Superior Court) 347.

If an infant's father dies, the infant's domicile "follows, in "the absence of fraud, that of its mother, until such time as "the mother re-marries, when, by reason of her own domicile "being subordinate to that of her husband, that of the infant "ceases to follow any further change by the mother, or, in "other words, does not follow that of its stepfather" (b). This doctrine laid down in an American case would probably be followed by our courts. The result would be, that the infant would retain the domicile which he had immediately before the mother's re-marriage (c).

The doctrine laid down in the American judgment, just cited, is perhaps, however, not sound to its full extent. It is reasonable to hold, that the fiction which assigns to a woman on marriage the domicile of her husband should not be extended, so as necessarily to give to stepchildren the domicile of their stepfather; but it is less easy to see why it should be held, that a widow, on re-marriage, loses all control over the domicile of her infant children, born during her first marriage.

It is possible, therefore, that our courts might hold, that if a woman after her second marriage, in fact changed her domicile, *e.g.*, from England to Germany, and took the infant children of her first husband with her, they, too, acquired a German domicile.

The father and mother of an infant are, at the death of the father, domiciled in England. The widow retains her English domicile until her marriage in England with a Frenchman domiciled in France. She then acquires a French domicile. The infant retains his English domicile.

The father and mother of D., an infant, are at his birth domiciled in England. The father dies, and the mother thereupon, when D. is two years old, goes with him to Germany, marries a German, and acquires a German home and domicile. D. resides with his mother. D., perhaps, acquires a German domicile.

(b) *Ryall v. Kennedy*, 40 N. Y. (Superior Court) 347, 360, *per Curiam*.

(c) The same principle applies to the marriage of the mother of an illegitimate infant after the death of his father.

Fraudulent attempt of mother, &c., to change infant's domicil.

Exception 2 to Sub-Rule:—The change of an infant's home by a mother or a guardian does not, if made with a fraudulent purpose, change the infant's domicil.

A mother or guardian cannot, perhaps, change the domicil of an infant when the change of home is made for a fraudulent purpose, *e.g.*, to affect the distribution of an infant's estate, in case of his death (*d*). The existence, however, of this exception is open to doubt.

D., an infant, whose father is dead, is domiciled in England. M., the infant's mother, expecting him to die, takes him to Jersey, and acquires a domicil there, in order that the succession to D.'s property may be according to the law of Jersey, and not according to that of England.

It is doubtful whether D.'s domicil does not remain English.

Domicil of married woman same as husband's.

SUB-RULE 2.—The domicil of a married woman is during coverture the same as, and changes with, the domicil of her husband (*e*).

A woman, of whatever age, acquires at marriage the domicil of her husband, and her domicil continues to be the same as his, and changes with his, throughout their married life.

The fact that a wife actually lives apart from her husband (*f*), that they have separated by agreement (*g*), that

(*d*) See *Pottinger v. Wightman*, 3 Mer. 67.

(*e*) *Warrender v. Warrender*, 2 Cl. & F. 488.

Dolphin v. Robins, 7 H. L. C. 390 ; 29 L. J. (P. & M.) 11.

Re Daly's Settlement, 25 Beav. 456, 27 L. J. (Ch.) 751.

See *Westlake*, s. 42

Story, s. 46.

Phillimore, ss. 73—78.

Wharton, s. 43.

Savigny, s. 357, p. 56.

(*f*) *Warrender v. Warrender*, 2 Cl. & F. 488.

(*g*) *Dolphin v. Robins*, 7 H. L. C. 390

the husband has been guilty of misconduct, such as would furnish defence to a suit by him for restitution of conjugal rights (*h*), does not enable the wife to acquire a separate domicile. It is an open question whether even a judicial separation (not amounting to a divorce), would give a wife the power to acquire a domicile for herself (*i*). "If," says Lord Kingsdown, "any expressions of my noble and learned friend (*k*), have been supposed to lead to the conclusion, that his impression was in favour of the power of the wife to acquire a foreign domicile" [not her husband's], "after a judicial separation, it is an intimation of opinion in which at present I do not concur. I consider it to be a matter, whenever it shall arise, entirely open for the future determination of the House" (*l*).

D., an Englishwoman, married M., a domiciled Englishman. After some years they agreed to live separate, and ultimately obtained a divorce, which however was not valid, from the Scotch courts. D., after the supposed divorce, resided in France, and during M.'s lifetime married N., a domiciled Frenchman. M., her English husband, remained domiciled in England till D.'s death in France. D., at her death, was domiciled in England and not in France (*m*).

(*h*) *Yelverton v. Yelverton*, 1 Sw. & Tr. 574.

Dolphin v. Robins, 7 H. L. C. 390; 29 L. J. (P. & M.) 11.

(*i*) *Dolphin v. Robins*, 7 H. L. C. 390, 420.

Le Sueur v. Le Sueur, 1 P. D. 139, 2 P. D. 79.

(*k*) Lord Cranworth.

(*l*) 7 H. L. C. 420, judgment of Lord Kingsdown.

The cases in which a divorce has been granted on the petition of a wife whose husband was not domiciled in England (see Rule 46, Sub-Rule 2, Exception 3, p. 233, *post*) are sometimes cited as forming an exception to the rule that a wife has during coverture the domicile of her husband. They in no way, however, affect this rule, but if well decided only show that our courts will occasionally grant a divorce where the parties are not domiciled within their jurisdiction.

(*m*) *Dolphin v. Robins*, 29 L. J. (P. & M.) 11, 7 H. L. C. 390.

Rule 10. **RULE 10.**—A domicile cannot be acquired by a dependent person through his own act (*n*).

Dependent
person
cannot
acquire a
domicil.

A person who is not *sui juris* may, as a matter of fact, acquire an independent home. Thus D., an infant of eighteen, emigrates to Australia, buys a farm, and settles there. He in fact makes a home for himself in Australia. So, again, if D., a married woman, has entirely ceased to live with her husband (who resides in England), and goes and settles in Germany, with the intention of passing the rest of her life there, it is clear that she has in fact acquired an independent German home. What the rule in effect lays down is, that there is a distinct difference, in the point under consideration, between a home and a domicile, and that though an infant, or a wife, may sometimes in fact, as in the cases supposed, acquire a home, neither of them can acquire an independent domicile.

(1). An
infant.

It is quite certain that, as a general rule, no one can during infancy acquire a domicile for himself (*o*).

Can an
infant
under any
circum-
stances
acquire a
domicil for
himself?

It has, however, been suggested, that a male infant may possibly acquire a domicile for himself by marriage, or by setting up an independent household (*p*). The reason for this suggested exception, to the general rule, is, that a "married minor must be treated as *sui juris* in "respect of domicile, since on his marriage he actually founds "an establishment separate from the parental home" (*q*).

(*n*) *Somerville v. Somerville*, 5 Ves. 749a, 757, judgment of *Alvanley*, M.R.

The case of a female infant who changes her domicile on marriage, as where an Englishwoman of eighteen marries a domiciled Frenchman, may perhaps be held to afford a verbal exception to this rule. This is not a real exception. The change is not affected by the infant's act, but by a consequence attached by the law to the *status* arising from her act.

(*o*) *Westlake*, s. 36.

Savigny, s. 353, p. 57, note *t*.

Conf. *Stephens v. McFarland*, 8 Ir. Rep. 444.

(*p*) *Westlake*, s. 36.

(*q*) *Ibid.*, s. 37.

This reason must, if valid, extend to all cases in which an infant in fact acquires an independent domicile, and is not satisfactory. It involves some confusion between domicile and residence (*r*), and derives no support from the view taken by English law as to an infant's liability on his contracts, which is in no way affected by his marriage. The reasoning, therefore, by which the suggested exception is supported, may be held unsound, and the existence of the exception itself, be deemed in spite of the high authority in its favour, open to the gravest doubt.

Though a wife may acquire a home for herself, she can (2). A married woman under no circumstances have any other domicile, or legal home, than that of her husband (*s*).

SUB-RULE.—Where there is no person capable of changing an infant's domicile, he retains, until the termination of infancy, the last domicile which he has received.

Where no person capable of changing infant's domicile, it remains unchanged.

This appears to be a necessary deduction from Rules 4 and 9 (*t*).

D. is an infant, who at the death of his father, has an English domicile. His mother is dead, and he has no guardian. D. cannot change his own domicile, there is no person capable of changing it. D. therefore retains his English domicile.

RULE 11.—The 'last domicile which a person receives whilst he is a dependent person, continues, on his becoming an independent person, unchanged until it is changed by his own act.

Rule 11.
On becoming independent, person retains last dependent domicile till he changes it.

(*r*) See p. 43, *ante*.

(*s*) *Warrender v. Warrender*, 2 Cl. & F. 488.

Dolphin v. Robins, 7 H. L. C. 390, 29 L. J. (P. & M.) 11.

Yelverton v. Yelverton, 1 Sw. & Tr. 574, 29 L. J. (P. & M.) 84.

(*t*) pp. 66, 96, *ante*.

This is an obvious result of the principle laid down in Rule 4 (*t*). It applies to the case, first, of a person who attains his majority, and secondly, of a wife whose coverture is determined either by death or by divorce.

Person
attaining
majority
retains last
domicil till
changed.

SUB-RULE 1.—A person on attaining his majority retains the last domicil which he had during infancy until he changes it (*u*).

D. is the son of M. a domiciled Englishman, while D. is an infant M. emigrates to America. D. thereupon acquires an American domicil. When D. reaches twenty-one M. is still domiciled in America. D. retains his American domicil, until by his own act, he either resumes his English domicil, or acquires a new, *e.g.*, a French domicil.

If D. be residing in America, his American domicil, until changed, becomes his domicil of choice.

SUB-RULE 2.—A widow retains her late husband's last domicil until she changes it (*v*).

1. D., a woman whose domicil of origin is English, is married to a German, domiciled in Prussia. Her husband dies. D. continues living in Prussia. D. retains her Prussian domicil.

2. D., after the death of her German husband, leaves Prussia to travel, without any intention of returning to Prussia. D. resumes her English domicil of origin.

3. D., after the death of her German husband, settles in France with the intention of residing there permanently. D. acquires a French domicil.

(*t*) See p. 66, *ante*.

(*u*) A possible question may be raised, as to domicil of an infant widow. Probably it remains that of her husband, and cannot be changed (except in consequence of re-marriage) till she comes of age. As to power of father to change it!

(*v*) See *Story*, s. 46, citing *Dig. Lib.* 50, *tit.* 1, l. 38, s. 3. *Gout v. Zimmermann*, 5 Notes of Cases, 455.

4. D., after the death of her German husband, marries at Berlin, an American domiciled at New York. D. acquires a domicile at New York (x).

SUB-RULE 3.—A divorced woman retains the domicile which she had immediately before, or at the moment of, divorce until she changes it.

Divorced
woman
retains
domicil of
former
husband
till she
changes it.

The position of a divorced woman is for the present purpose the same as that of a widow.

(x) See, however, p. 106, note (n), *ante*.

CHAPTER II.

DOMICIL OF LEGAL PERSONS OR CORPORATIONS.

Rule 12. **RULE 12.**—The domicile of a corporation is the place considered by law to be the centre of its affairs, which

Domicil of
corpora-
tion.

- (1) in the case of a trading corporation, is its principal place of business, *i.e.*, the place where the administrative business of the corporation is carried on,
- (2) in the case of any other corporation, is the place where its functions are discharged (*a*).

The conception of a home or domicile, depending as it does on the combination of residence and intention to reside (*b*), is, in its primary sense, applicable only to human beings; but by a fiction of law, an artificial domicile may be attributed to legal beings, or corporations.

The following observations, as to such an artificial domicile are worth notice:—

First.—The domicile of a corporation is entirely distinct from the domicile of the persons who compose the corporation. Thus the London and North-Western Railway Company has its domicile in London (*c*). Its shareholders

(a) 2 *Lindley*, App. 1, p. 1483, 4th ed. *Savigny*, ss. 354, pp. 63, 64. *Westlake*, ss. 128, 129.

(b) See pp. 111, 112, *post*.

(c) See *Calcutta Jute Company v. Nicholson*, 1 Ex. D. 428, 446. *Conf. Attorney-General v. Alexander*, L. R. 10 Ex. 20.

reside in England, France, Italy, &c., and have their domicils in different countries.

Secondly.—As regards the domicil of a corporation, the distinction between residence (*b*) and home does not exist.

Thirdly.—The domicil of a corporation must be fixed in a definite place within a country. The Cesena Sulphur Company is domiciled in England, because its domicil is fixed at a particular place in London.

The residence and domicil of an incorporated trading (1) Trading company, are determined by the situation of its principal place of business (c). (1) Trading corporations.

By the principal place of business is meant the place where the administrative business of the company is conducted. This may not be the place where its manufacturing or other business operations are carried on (*d*).

Thus if a company incorporated under the Companies' Acts, 1862, 1867, for the carrying on of manufactures in India, has a registered office in England, and its affairs are conducted in England, the company is domiciled in England, not in India. The registration of the company is not of itself decisive. The question in each case is, where is it that the real business of the company is carried on? According to the answer to that question, the company's domicil must be determined (*e*).

In most cases, except those of trading companies, the (2) Other domicil of a corporation is fixed, by its obvious connection with some special district. This applies to incorporated towns, colleges, hospitals, obviously formed for the discharge of functions in a particular place. The same remark is (2) Other corporations.

(b) See, however, p. 112, *post*.

(c) *Lindley*, p. 1484.

Conf. Taylor v. Crowland Gas Co., 11 Ex. 1, 23 L. J. (Ex.) 254.

Adams v. G. W. Ry. Co., 6 H. & N. 404.

Corbett v. General Steam Navigation Co., 4 H. & N. 482.

(d) *Lindley*, pp. 1484, 1485.

(e) See *Cesena Co. v. Nicholson*, 1 Ex. D. 428, 437, 450, 453.

Attorney-General v. Alexander, L. R. 10 Ex. 20, 32.

applicable to such corporations sole as bishops, rectors, &c. The domicile of a bishop, as such, must (it is conceived) be found in his see, and that of a rector, in his parish.

In the case of corporations sole, there may be a distinction between the private domicile of the person, *e.g.*, the bishop, at any given moment constituting the corporation, and his corporate domicile. Thus, though it is in modern times unlikely that an English bishop should live abroad quite away from his see, with the intention of permanently residing in a foreign country, it might be held, should such a case occur, that the bishop had acquired in his private capacity, a foreign domicile. In his corporate capacity, he would be in any case held to be domiciled in his diocese.

Can a corporation have two domiciles?

It may be maintained, that a corporation can have two domiciles. In support of this view, are cited cases in which it has apparently been decided, that a corporation can, for the purpose of being sued, have a domicile in each of two countries (*e*).

Such cases are not decisive, for liability to be sued does not in the case of a corporation, any more than of an individual, depend upon domicile. They may each be sued in the courts of this country, if amenable to the process of our courts. There is in this respect no difference between a foreign individual and a foreign corporation, except that the individual may be amenable to process both in his person and in his property, whilst a corporation, domiciled abroad, can (it is conceived) only be amenable to process through its property and through its agents. On the whole, the better opinion seems to be, that a corporation has, following the analogy of an individual, one principal domicile, at the place where the centre of its affairs is to be found, and that the other places, in which it may have subordinate offices, correspond as far as the analogy can be carried out at all, to the residence of an individual.

PART II. (a)

ASCERTAINMENT OF DOMICIL.

This part is concerned not with the nature, but with the evidence, or criteria of domicile.

The rules in the foregoing part (b) concern the nature, the acquisition, and the change of domicile. Their object is to show how, the necessary facts being known, a person's domicile is to be determined.

The rules in this part (c) show what is the evidence of domicile, *i.e.*, what are the facts from which the courts will infer the existence of a domicile.

(a) The *criteria* or proofs of domicile are most fully investigated by *Phillimore*. See *Phillimore*, ss. 211—351.

(b) Rules 1 to 12, pp. 42—112, *ante*.

(c) Rules 13 to 19, pp. 114—147, *post*.

CHAPTER I.

DOMICIL, HOW ASCERTAINED.

- Rule 13.** **RULE 13.**—The domicile of a person can always
 Domicil be ascertained by means of either
 always
 ascertain- (1) a legal presumption ; or
 able. (2) the known facts of the case.

Even on the assumption that every one has at all times a domicile, there may often (if the thing be considered without reference to rules of law) be a difficulty in determining where a given person D., had his home or domicile at a particular moment. The difficulty may arise from ignorance of the events of D.'s life, or from the circumstance that the facts which are known to us, leave it an open question whether D. was at a given moment (say at the date of his death) domiciled in England or in Scotland. Under such circumstances, an inquirer who had no other object than the investigation of truth, and who was neither aided nor trammelled by legal rules, would, if he tried to ascertain where D. was domiciled at the date of his death, be forced to acquiesce in the merely negative conclusion that D.'s domicile at that date could not be ascertained. To this negative result the courts, from obvious motives of convenience, refuse to come (*a*), and will always, however

(*a*) Contrast this with the absence of any legal presumption as to the moment at which a death takes place. *In re Phend's Trusts*, L. R. 5 Ch. 139 ; *In re Walker*, L. R. 7 Ch. 120 ; *Mason v. Mason*, 1 Mer. 308.

slight or inconclusive in itself may be the character of the evidence placed before them, determine in what country D. was at a given moment domiciled.

This result is obtained, partly by the use of certain legal presumptions (*b*), partly where the claims of each of two places to be D.'s domicile are on the known facts of the case all but equally balanced by allowing the slightest circumstance to turn the scale decisively in favour of the one rather than of the other.

Hence (though the fact is not always realized by writers on domicile) the process by which a person's domicile is determined by the courts has a somewhat artificial character.

A fact (*viz.* the co-existence of residence and of intention on D.'s part to reside in a particular country) has to be treated as proved, though in reality no sufficient evidence of the fact exists. Hence, very slight circumstances receive a weight which they do not in themselves deserve. D., for example, had a house in Scotland and a house in England. He lived nearly as frequently in the one as in the other. In some letters he wrote of England in others of Scotland as his home. His domicile of origin was Scotch. His wife lived in London more often than in Edinburgh. D. himself is dead. All parties who can give evidence as to his intentions are biased in favour either of the English or of the Scotch domicile. The conclusion of an impartial inquirer would probably be that no certain opinion could be formed on the question, whether D. was at the time of his death domiciled in England or in Scotland. The courts, compelled to come to a conclusion one way or the other, attach an artificial value to some point in the case, *e.g.*, to Scotland being D.'s domicile of origin, or to his wife's habitual residence in England, and thus turn the balance between what are in truth equally balanced probabilities.

(*b*) See Rules 14, 15, pp. 116, 117, *post*.

CHAPTER II.

LEGAL PRESUMPTIONS.

Rule 14. **RULE 14.**—A person's presence in a country is presumptive evidence of domicile.
Presence in a place.

"A person's being in a place is *prima facie* evidence of his being domiciled there, and it lies on those who say "otherwise to rebut this presumption" (a). "The actual "place where [a man] is, is *prima facie* to a great many "given purposes, his domicile" (b). Hence the importance often attached in questions of domicile to the place of birth and to the place of death.

Place of birth. The place of a man's birth has in itself no necessary connection with the place of his domicile, for though D. be born in England, yet if D.'s father is then domiciled in France, D.'s domicile of origin is not English but French (c). If, however, nothing be known about D.'s domicile except the fact of his birth in England, this fact is ground for a presumption that D.'s domicile at the moment of his birth, and therefore D.'s domicile of origin, was English.

It is, of course, on this ground that a foundling (d), of whom nothing is known but the fact of his being found

(a) *Bruce v. Bruce*, 2 B. & P. 229, 231, per Lord Thurlow.

(b) *Bempde v. Johnstone*, 8 Ves. Junr. 198, 301, per Loughborough, C.

(c) See Rule 6, p. 69, *ante*.

(d) *Ibid*.

within the limits of a particular country, *e.g.*, England, acquires a domicile of origin in that country.

The place of a person's death in no way of itself affects ^{Place of death.} his domicile, but the fact that he was present in a particular country at the moment of his death, is, in the absence of any proof to the contrary, ground for a presumption of his being then domiciled in that country.

"A man, [it has been said (e)] is *prima facie* domiciled "at the place where he is resident at the time of his death: "and it is incumbent on those who deny it to repel the "presumption of law, which may be done in several ways. "It may be shown that [D.] was there as a traveller, or "on some particular business, or on a visit, or for the sake "of health; any of which circumstances will remove the "impression that he was domiciled at the place of his "death."

The principle here laid down is sound. Where, indeed, there is a balance of evidence between the claims of two possible domicils, the place of a man's death is irrelevant. For "there is not a single dictum, from which it can be "supposed that the place of *death* in a case such as that, can "make any difference. Many cases are cited in *Denisart*, "to show that the death can have no effect, and not one, "that that circumstance decides between two domicils" (f); but if nothing which throws light on a man's domicile be known, then his death at a place is important, as giving rise to the application of the general principle, that the place where a person *is* must, in the absence of counter evidence, be assumed to be his domicile.

RULE 15.—When a person is known to have ^{Rule 15.}

(e) In an American case, *Guier v. O'Daniel*, 1 Binney's Rep. 349, note. See *Phillimore*, s. 235.

(f) *Somerville v. Somerville*, 5 Vesey 749 a, 788, per *Alvanley*, M.R. See also *Johnstone v. Beattie*, 10 Cl. & F. 42; *Craigie v. Lewin*, 3 Curt. 435.

Domicil
once
acquired
presumed
to be
retained.

had a domicile in a given country he is presumed, in absence of proof of a change, to retain such domicile (*g*).

This is a rule rather of common sense than of law. If a person is known to have had a home in one place, it lies on those who assert he has changed it, to prove the fact.

D. is proved to have been domiciled in Scotland, in 1870. If in 1879 it be alleged that D's domicile is not Scotch, the person who makes this allegation must prove it. D.'s domicile in Scotland, that is to say, is presumed to continue until a change is proved (*h*).

(*g*) See *Munro v. Munro*, 7 Cl. & F. 842, 891; *Aikman v. Aikman*, 3 Macq. 854, 877; *Douglas v. Douglas*, L. R. 12 Eq. 617, 642, 643.

(*h*) This principle of evidence must be carefully distinguished from the rules of law that every one retains his domicile of origin until another domicile is acquired (see Rule 4, p. 66, *ante*), and resumes it whenever an acquired domicile is simply abandoned (see Rule 8, p. 86, *ante*). These are simply conventional rules of law, resorted to in order to maintain the general principle that no person can be without a domicile (see Rule 2, p. 59, *ante*).

CHAPTER III.

FACTS WHICH ARE EVIDENCE OF DOMICIL.

RULE 16.—Any circumstance may be proof or evidence of domicile, which is evidence either of a person's residence (*factum*), or of his intention to reside permanently (*animus*), within a particular country.

Rule 16.

Any fact
proving
residence,
&c., evi-
dence of
domicil.

As domicile consists of or is constituted by residence and the due *animus manendi*, any fact from which it may be inferred, either that D. "resides" or has the "intention of indefinite residence" within a particular country, is, as far as it goes, evidence that D. is domiciled there.

If the criticism be made that this statement merely amounts to saying that any fact in a man's life may be evidence of his domicile, the observation is as far as it goes perfectly just.

"There is," it has been said, "no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicile. A trivial act might possibly be of more weight with regard to determining this question than an act which was of more importance to a man in his lifetime" (a), and the cases with regard to disputed domicile bear out this *dictum*.

(a) *Drevon v. Drevon*, 34 L. J. (Ch.) 129, 133; per *Kindersley*, V.C.

There is no transaction in the course of a person's life, which the courts have not admitted (for whatever it is worth) in evidence of his domicile (*b*). Hence presence in a place (*c*), time of residence (*d*), the mere absence of proof that a domicile once acquired has been changed (*e*), the purchase of land (*f*), the mode of dealing with a household establishment (*g*), the taking of lodgings (*h*), the buying of a burial place (*i*), the deposit of plate and valuables (*k*), the exercise of political rights (*l*), the way of spelling a Christian name (*m*), oral or written expressions (*n*) of intention to make a home in a particular place, or from which such an intention, or the absence of it, may be inferred, have all been deemed matters worth consideration in determining the question of a person's domicile.

While, however, it is true that there is no circumstance in a man's life, which may not be used as evidence of domicile, it is also true that there are two classes of facts, viz., first, "expressions of intention," and, secondly, "residence," which are entitled to special weight, as evidence of the matter (*o*) which, in questions of domicile, it is generally

(*b*) See especially *Drevon v. Drevon*, 34 L. J. (Ch.) 129; *Hoskins v. Matthews*, 25 L. J. (Ch.) 689, 8 De G. M. & G. 18; *Aitchison v. Dixon*, L. R. 10 Eq. 589; *Douglas v. Douglas*, L. R. 12 Eq. 617; *Hodgson v. De Beauchessne*, 12 Moore, P. C. 285.

(*c*) *Bruce v. Bruce*, 2 B. & P. 229.

Bempde v. Johnstone, 3 Vesey, junr. 198.

(*d*) *The Harmony*, 2 C. Rob. 322.

(*e*) *Munro v. Munro*, 7 Cl. & F. 842, 891.

(*f*) *In re Capdevielle*, 33 L. J. (Ex.) 306, 2 H. & C. 985.

(*g*) *Somerville v. Somerville*, 5 Vesey, 749a.

(*h*) *Craigie v. Lewin*, 3 Curt. 435.

(*i*) *In re Capdevielle*, 33 L. J. (Ex.) 306, 2 H. & C. 985.

(*k*) *Curling v. Thornton*, 2 Add. 19; *Hodgson v. De Beauchessne*, 12 Moore P. C. 285.

(*l*) *Brunel v. Brunel*, L. R. 12 Eq. 298.

(*m*) *Ibid.*

(*n*) *Udny v. Udny*, L. R. 1 Sc. App. 441; *Bell v. Kennedy*, *ibid.* p. 307; *Doncet v. Geoghegan*, 9 Ch. D. 441.

(*o*) No special rules can be given, as to the evidence of a person's residence in a particular place. Residence is a physical fact, to be proved in the same way as any other physical fact, *e.g.*, the commission of an assault.

most difficult to establish, viz., the existence of the necessary *animus manendi*, and that certain rules, though of a very general character, may be laid down, as to the effect of such facts in proving the existence of such intention (*p*).

RULE 17.—Expressions of intention to reside permanently in a country are evidence of such an intention and in so far evidence of domicile (*q*).

Rule 17.
Effect of
expressions of
intention.

A person's intention with regard to residence may be inferred from his expressions on the subject. These expressions may be direct, as where D. says or writes that it is his purpose to settle in Scotland. They may be indirect, as where D., by his acts, *e.g.*, the purchase of a burial ground at Edinburgh, intimates an intention of acquiring or keeping a Scotch home.

D., an English peer, who had lived for some time in France, expressed in a letter a deliberate intention of never returning to England. He also accepted the jurisdiction of a French court, on the ground, expressed in a letter to his attorney, of his being *bond fide* domiciled in France, and added, "I have no domicile in England or any other country excepting the one [France] from which I now write" (*r*). These expressions, combined with other circumstances, were, after D.'s death, held to prove that he was in fact domiciled in France.

Direct ex-
pressions.

Direct expressions, however, of intention may be worth little as evidence (*s*). The person who uses them may not know what constitutes a domicile. He may call a place his home, simply because he often lives there. He may wish to be, or to appear, domiciled in one country, while in fact

The mode, therefore, in which the fact is to be proved calls for no special notice in this work.

(*p*) See Rules 17—19, pp. 121—147, *post*.

(*q*) See *Hamilton v. Dallas*, 1 Ch. D. 257; *Udny v. Udny*, L. R. 1 Sc. App. 441; *Bell v. Kennedy*, *ibid.* p. 307.

(*r*) *Hamilton v. Dallas*, 1 Ch. D. 257, 259.

(*s*) See *Doucet v. Geoghegan*, 9 Ch. D. 441.

residing permanently, and intending so to reside, *i.e.*, being domiciled, in another. A direct statement, in short, that D. considers himself domiciled, or to have his home in France, though it may sometimes be important, may often carry little weight. This remark specially applies to the description which a person gives of himself, in formal documents, as, *e.g.*, "D., residing in France (*t*)."

Indirect
expres-
sions.

A person's purpose may be more certainly inferred from his acts than from his language. Thus, the fact that D. keeps up a large establishment in England (*u*), that he occupies a particular kind of house (*x*), that he deposits his plate and valuables there (*y*), and a hundred other circumstances, may be indicative of a purpose to live permanently in England, and therefore be evidence of his having an English domicile.

Rule 18.

Residence
evidence of
domicil.

RULE 18.—Residence in a country is *prima facie* evidence of the intention to reside there permanently (*animus manendi*) and in so far evidence of domicile (*z*).

"Residence," though not the same as domicile, is not only one of the elements which go to make up domicile, but is also in many cases the main evidence for the existence of the other element which constitutes domicile, *viz.*, the *animus manendi* (*a*). "Residence alone has no effect

(*t*) *Attorney-General v. Kent*, 31 L. J. (Ex.) 391, 1 H. & C. 12; *Hamilton v. Dallas*, 1 Ch. D. 257; *Udny v. Udny*, L. R. 1 Sc. App. 441.

(*u*) *Somerville v. Somerville*, 5 Vesey, 749 *a*.

Forbes v. Forbes, 23 L. J. (Ch.) 724, Kay, 341.

(*x*) *Craigie v. Lewin*, 3 Curt., 435.

(*y*) *Curling v. Thornton*, 2 Add. 19.

(*z*) *Munro v. Munro*, 7 Cl. & F. 842. *The Harmony*, 2 C. Rob. 322.

(*a*) This twofold aspect of residence should be noticed, as the failure to keep clearly in view the relation between residence and domicile has (it is submitted) often confused the views both of writers and Judges as to the nature of domicile.

"*per se*, though it may be most important, as a ground from which to infer intention" (b). But the effect of residence as evidence depends both on the *time* and on the *mode* of residence.

Time or length of residence does not of itself constitute Time. domicil. An ambassador, for example, might reside thirty years at the court to which he is sent, without acquiring a domicil in a foreign country (c). Nor does the law of England, like some other systems, prescribe a definite length of residence, *e.g.*, ten years, after which a person shall be assumed to have acquired a domicil in a particular country. On the other hand, no length of time is necessary for the acquisition of a home, or domicil; D. emigrates to America, with the intention of settling there, and actually begins his residence there; he forthwith acquires an American domicil. But time, which is not an element of domicil, is the most important evidence of domicil, a residence, that is to say, by D. for thirty years in England, is strong evidence of his purpose to reside there, and therefore of his having an English domicil. This is the sense in which the following well-known passage is to be understood:—

"Time is the grand ingredient in constituting domicil
 "I think that hardly enough is attributed to its effects (d);
 "in most cases, it is unavoidably conclusive: it is not
 "unfrequently said that if a person comes only for a
 "special purpose, *that* shall not fix a domicil. That is not
 "to be taken in an unqualified latitude and without some
 "respect had to the time which such a purpose may or
 "shall occupy: for, if the purpose be of a nature that may
 "probably, or does actually, detain the person for a great
 "length of time, I cannot but think that a general residence
 "might grow on the special purpose. A special purpose
 "may lead a man to a country where it shall detain him
 "the whole of his life. A man comes here to follow a law

(b) *Munro v. Munro*, 7 Cl. & F. 842, 877, *per Cottenham*, C.

(c) As to ambassadors, see pp. 137, 138, *post*.

(d) *i.e.*, as evidence of domicil.

"suit: it may happen and indeed is often used as a ground
 "of vulgar and unfounded reproach (unfounded as matter of
 "just reproach, though the fact may be true) on the laws of
 "his country, that it may last as long as himself. . . .
 "I cannot but think, that against such a long residence, the
 "plea of an original special purpose could not be averred:
 "it must be inferred in such a case that other purposes forced
 "themselves upon him, and mixed themselves into his
 "original design, and impressed upon him the character of
 "the country where he resided. Suppose a man comes
 "into a belligerent country at or before the beginning of a
 "war: it is certainly reasonable not to bind him too soon
 "to an acquired character, and to allow him a fair time to
 "disengage himself; but if he continues to reside during a
 "good part of the war, contributing by payment of taxes
 "and other means to the strength of that country, I am of
 "opinion that he could not plead his special purpose with
 "any effect against the rights of hostility" (e).

The effect of time must not be exaggerated. It is weighty as evidence; but it is not more than evidence of domicile.

"Length of time is [to be] considered one of the *criteria*,
 "or one of the *indicia*, from which the intention to acquire
 "a new domicile is to be inferred, and it is considered a very
 "material ingredient in the consideration of the question.
 ". . . Some foreign jurists have suggested, if they have
 "not actually laid it down, that a period of ten years' resi-
 "dence ought of itself to be a sufficient indication of the
 "intention to acquire a new domicile. But, certainly, that
 "is not the view of the law that has been adopted by
 "English jurists generally, and I think it is impossible to
 "lay down any precise period which *per se* is to constitute
 "domicil. At the same time, if a man goes to another

(e) *The Harmony*, 2 C. Rob. 322, 324, *per Sir W. Scott*. It should be noticed that this passage refers to what is known as a "commercial domicile" during the period of war, and that time is of much more consequence in determining the existence of such a domicile than in determining the existence of a domicile properly so-called. See *Commercial Domicil*, App., Note III.

"country and continues to reside there for . . . a
 "period of ten years, without saying that a residence of ten
 "years is necessary, or that ten years is the period sufficient,
 "still, the fact of his residing there for ten years is a very
 "strong indication of his intention to establish his home
 "and his domicile in that place" (*f*).

The effect of residence in a country as evidence of a Man's intention to continue residing there, depends, to a great extent, on the manner of his residence.

If D. not only lives in France but buys land there, and makes that country the home of his wife and family, there is clearly far more reason for inferring a purpose of residence on his part, than if he has merely taken lodgings in Paris, and lives there alone.

The presence, indeed, of a man's wife and family is sometimes spoken of as decisive (*g*), which it certainly is not; but this and various less important facts, such as the place where a man educates his children (*h*), or exercises his political rights (*i*), indicate, though they do not prove, a fixed residence, and thus go to make up the evidence for domicile.

RULE 19.—Residence in a country is not even *prima facie* evidence of domicile, when the nature of the residence either is inconsistent with, or rebuts the presumption of, the existence of an intention to reside there permanently (*animus manendi*) (*k*).

Rule 19
 Residence
 inconsistent
 with
 the *animus*
manendi
 not evi-
 dence of
 domicile.

If D. resides in France this residence is *prima facie* evidence of his intending to reside there, and, therefore, of

(*f*) *Cockrell v. Cockrell*, 25 L. J. (Ch.) 730, 732, per *Kindersley*, V.C.

(*g*) *Douglas v. Douglas*, L. R. 12 Eq., 617; *Forbes v. Forbes*, Kay 341.

(*h*) *Haldane v. Eckford*, L. R. 8 Eq. 631.

(*i*) *Brunel v. Brunel*, L. R. 12 Eq. 298.

(*k*) See *Jopp v. Wood*, 4 De G. J. & S. 616, 34 L. J. (Ch.) 212; *Hodgson v. De Beauchessne*, 12 Moore P. C. 285, 329, 330.

his having a French domicile; so, further, if D., who has been a domiciled Englishman, takes up his residence in France, the fact of his dwelling in France gives, especially if he lives there for a long time, a *prima facie* reason for believing that he intends to make France his home, and, therefore, intends to acquire, and has acquired, a French domicile. But if D., having been a domiciled Englishman, resides in France under circumstances which preclude the possibility of the residence being the result of any purpose on his part to reside permanently in France (as, for example, if D. is an English prisoner of war, kept captive in France), or which make it at any rate probable that D. means to retain his English domicile (as where D. lives at Paris as an English ambassador to the French Court), then D.'s residence is no proof whatever of his intention to reside in France as his home, and he may be presumed to retain his English domicile.

The law on this point has been laid down authoritatively.

"Nothing is better settled with reference to the law of domicile than that domicile can be changed only *animo et facto*, and although residence may be decisive as to the *factum*, it cannot, when looked at with reference to the *animus* be regarded otherwise than as an equivocal act. The mere fact of a man residing in a place, different from that in which he has been before domiciled, even although his residence there may be long and continuous, does not of necessity shew that he has elected that place as his permanent and abiding home. He may have taken up and continued his residence there for some special purpose, or he may have elected to make that place his temporary home. But domicile, although in some cases spoken of as home, imports an abiding and permanent one, and not a mere temporary one. . . . In considering cases of this description it must be borne in mind that the acquisition of a new domicile involves the abandonment of the previous domicile. . . . Whether this intention of abandonment may not be inferred from long and continuous residence

"alone, in a case in which there may be no other circumstances indicative of the intention, is a question which in this case it is unnecessary to decide, and on which, therefore, I give no opinion. Such a case can very rarely, if ever, occur" (l).

"We think that length of residence, according to its time and circumstances, raises the presumption of intention to acquire domicile. The residence may be such, so long and so continuous, as to raise a presumption nearly, if not quite, amounting to a *presumptio juris et de jure*; a presumption not to be rebutted by declaration of intention, or otherwise than by actual removal. Such was the case of *Stanley v. Bernes* (m). The foundation of that decision, in this respect, was, that a Portuguese domicile had been acquired by previous residence and acts, and that mere declarations of intention to return could not be sufficient to prove an intention not to acquire a Portuguese domicile.

"In short, length of residence *per se* raises a presumption of intention to abandon a former domicile, but a presumption which may, according to circumstances, be rebutted.

"It would be a dangerous doctrine to hold that mere residence, apart from the consideration of circumstances, constitutes a change of domicile. A question which no one could settle would immediately arise, namely, what length of residence should produce such consequence. It is evident that time alone cannot be the only criterion. There are many cases in which a very short residence would constitute domicile, as in the case of an emigrant, who having wound up all his affairs in the country of his origin, departs with his wife and family to a foreign land and settles there. In a case like that, a residence for a very brief period would work a change of domicile.

"Take a contrary case, where a man, for business or pleasure, or mere love of change, is long resident abroad, occasionally returning to the country of his origin, and

(l) *Jopp v. Wood*, 4 De Gex, J. & S. 616, 621, 622, *per Turner*, L. J.

(m) 8 Hag. Ec. 373.

"maintaining all his natural connections with that country:
 "the time of residence would not to the same extent, or in
 "the same degree, be proofs of a change of domicile.

"We concur, therefore, in the doctrine held in many
 "previous cases, that to constitute a change of domicile, there
 "must be residence, and also an intention to change.

"With respect to the evidence necessary to establish the
 "intention, it is impossible to lay down any positive rule.
 "Courts of justice must necessarily draw their conclusions
 "from all the circumstances of each case; and each case
 "must vary in its circumstances, and, moreover, in one, a
 "fact may be of the greatest importance, but in another, the
 "same fact may be so qualified as to be of little weight" (n).

Examina-
 tion into
 domicile of
 particular
 classes of
 persons.

The principle laid down in the passages cited explains,
 without recourse to any special rule of law, the position of
 most of the persons supposed to have a so-called necessary
 domicile (o).

These persons are :—

1. *Prisoners*;
2. *Exiles or refugees*;
3. *Convicts*;
4. *Lunatics*;
5. *Invalids residing abroad on account of health*;
6. *Officials generally*;
7. *Ambassadors*;
8. *Consuls*;
9. *Persons in military or naval service*;

(n) *Hodgson v. De Beaucheme*, 12 Moore P. C. 285, 329, 330, *per Curiam*.

(o) A "necessary domicile" is in strictness a domicile not determined by the purpose or choice of the party, but by the direct operation of some rule of law, such, for example, is the domicile of a wife or of an infant.

The term, however, "necessary domicile," is sometimes applied to the case of persons such as prisoners, ambassadors, and others. This application of the term is, it is here contended, erroneous. The peculiarity (if any) in the position of such persons consists in the fact that their residence in a particular country either cannot be, or is not, combined with the *animus manendi*, and therefore gives no ground for inferring that they have a domicile in such country. See, as an example of confusion on this subject, *Round, Domicil*, p. 81.

10. *Persons in Indian service* ;
11. *Servants* ;
12. *Ecclesiastics* ;
13. *Students* (p).

(i.) *A Prisoner*.—A prisoner retains, during imprisonment, the domicile which he possessed at its commencement. He cannot form any purpose or intention as to his residence in the place where he is imprisoned.

D., a domiciled Irishman, was imprisoned in England. "It could not," it was laid down, "be supposed that he acquired a domicile in England by residence within the walls of the King's Bench Prison. *All such residence goes for nothing*" (q).

(ii.) *A Convict*.—A person transported to a particular country for life absolutely loses (it is said) his original domicile (r). It is certainly possible that, in this instance, "the domicile of origin may be extinguished by act of law" (s). A sentence, further, to be transported to Van Dieman's Land, may probably be looked upon as an order, that the convict shall reside, and make his home in Van Dieman's Land, *i.e.*, be domiciled there, but there seems to be no English decision on the subject, and in the absence of any such decision doubt may be entertained whether there be any real distinction between the position of a

(p) As to domicile of these persons, see *Phillimore*, ss. 67—72, 183—200. *Wharton*, ss. 47—54. *Phillimore*, whose treatment of the subject is ample, sometimes appears to consider that the domicile of these persons is fixed by a rule of law, whereas in general, according to English law at any rate, their domicile (it is submitted) results simply from the application to their peculiar circumstances of the ordinary rules regulating the change and acquisition of domicile. See *Classification of Domicile*, App. Note II.

(q) *Burton v. Fisher*, *Milward's Reps.* 183, 191, 192.

The case itself, does not decide more, than that D. did not, as a fact, acquire an English domicile, but the principle contained in the words underlined, is clearly sound. *Westlake*, s. 52. ; *Phillimore*, s. 186, 187.

(r) *Phillimore*, s. 191 ; *Udny v. Udny*, L. R. 1 Sc. App. 441, 458.

See for a different view *Round, Domicil*, p. 52.

(s) *Phillimore*, s. 191 ; *Udny v. Udny*, L. R. 1 Sc. App. 441, 458.

convict, and of a prisoner. A person, at any rate, transported for years, ought, it would seem, like a prisoner, to retain the domicile which he possessed at the beginning of his imprisonment.

Supposing, however, that a sentence to transportation destroys a man's domicile of origin, it is probable that no courts other than those of the sovereign inflicting the sentence would give this effect to the sentence. French *émigrés* were treated by our courts as retaining their domicile of origin (*t*).

(iii.) *An Exile or Refugee (u)*.—An exile cannot dwell in his own country (*e.g.*, France), but he is not compelled to live in England. His residence, however, in England, certainly affords no presumption of an intention to adopt an English home. Mere residence, therefore, during the time of his exile, however long, does not give him an English domicile.

D., a French *émigré*, left France, his domicile of origin, in 1792. After a short residence in Germany, he resided in England till 1815, when he was able to return and did return to France. From 1815 to 1821, he resided generally in France. In 1821, D. bought a house in London. In 1834, he occupied this house and lived there till his death. D. never acquired an English domicile, but retained his French domicile at the time of his death (*x*). D.'s domicile of origin, it was laid down, "was France, for there he was born, "and continued to reside from 1765 to 1792, and he left "that country only in consequence of the disturbances which "broke out there. He came here in 1793, but he came in "the character of a Frenchman, and retained that character "till he left this country in 1814, for he received an allowance from our government as a French emigrant. Coming

(*t*) See *De Bonneval v. De Bonneval*, 1 Curt. 856. *In goods of Duchess d'Orleans*, 1 Sw. & Tr. 253.

(*u*) *Phillimore*, ss. 192–200. *Westlake*, s. 38. *Wharton*, s. 54. *Savigny*, s. 353, p. 56, note (*q*).

(*x*) *De Bonneval v. De Bonneval*, 1 Curt. 856.

“with no intention of permanently residing here, did any-
 “thing occur while he was resident here to indicate a
 “contrary intention? It is clear to me that as in the case
 “of exile, the absence of a person from his own country will
 “not operate as a change of domicile; so, where a party
 “removes to another country, to avoid the inconveniences
 “attending a residence in his own, he does not intend to
 “abandon his original domicile, or to acquire a new one in
 “the country to which he comes to avoid such incon-
 “veniences. At all events, it must be considered a com-
 “pulsory residence in this country; he was forced to leave
 “his own, and was prevented from returning till 1814. Had
 “his residence here been in the first instance voluntary; had
 “he come here to take up a permanent abode in this country,
 “and to abandon his domicile of origin, that is, to disunite
 “himself from his native country, the result might have
 “been different. It is true that he made a long and con-
 “tinued residence in this country; but I am of opinion that
 “a continued residence in this country is not sufficient to
 “produce a change of domicile; for he came here avowedly
 “as an emigrant, with an intention of returning to his own
 “country as soon as the causes ceased to operate which
 “had driven him from his native home. He remained a
 “Frenchman, and if he had died during the interval between
 “1798 and 1815, his property would have been administered
 “according to the law (x) of France” (y).

This case decides not (as is sometimes supposed) that
 an exile *cannot* acquire a domicile in his adopted country,
 but only that the bare fact of his residence there
 does not give him a domicile. A refugee, probably, may
 acquire a domicile in a foreign country, if he chooses to adopt
 it as his home (z), and, of course, may acquire a domicile
 in a foreign country, by remaining there, after his restora-
 tion to his own country has become possible.

(x) See Rules 66—68, pp. 291—297, *post*.

(y) *De Bonneval v. De Bonneval*, 1 Curt. 856, 864, *per Sir Herbert Jenner*.
In goods of Duchess d'Orleans, 1 Sw. & Tr. 258.

(z) *Heath v. Sampson*, 14 Beav. 441; *Westlake*, s. 38, note g.

(iv.) *A Lunatic (a).*—There are two views as to the position of a lunatic when under control.

The first is, that he retains the domicile which he possessed at the time he became insane, or, more strictly, when he begun to be legally treated as insane. This is the sound view, and is favoured by the English cases on the subject (*b*). If this view be correct, the lunatic under confinement is in the same position as a prisoner. He cannot exercise choice, or will. He cannot, therefore, acquire a domicile. Hence he retains his existing domicile (*c*). D., for example, is an Englishman, who becomes lunatic, and is under control. He is taken to Scotland, and placed in a Scotch asylum. He remains there, until his death. He retains, on this view, his English domicile. The time in the asylum counts for nothing.

The second view is, that a lunatic is a person not *sui juris*, who stands in somewhat the same relation to his committee as a child to his father, and that, therefore, his domicile can be fixed by his committee (*d*). This view is favoured by several American cases (*e*), but is open to objection. In the case of father and child, the infant's domicile follows that of the father, but a father cannot give his son a domicile apart from his own. In the case of a committee and a lunatic, it appears to be maintained, not that a lunatic's domicile follows that of the committee, but that it can be fixed by the committee, or, in effect, that a committee has greater power over the domicile of a lunatic, than a father over that of his son. If the position of a committee be compared to that of a guardian, then it

(a) *Westlake*, s. 52. *Phillimore*, ss. 134—139 b.

Wharton, ss. 52, 53.

(b) See *Bempde v. Johnstone*, 3 Ves. Junr. 198; *Hepburn v. Skirving*, 9 W. R. 764.

(c) See Rule 4, p. 66, *ante*.

(d) See *Sharpe v. Crispin*, L. R. 1 P. & D. 611, 617, 618, which, however, does not decide this point.

(e) *Holyoke v. Haskins*, 5 Pick. 20. *Anderson v. Anderson*, 42 Vt. 350. *Pitfield v. Detroit*, 53 Maine, 442.

must be remarked, that the power of a guardian to change a ward's domicile, is itself doubtful (*f*).

On the whole, the first view appears to be (at least under ordinary circumstances) the right one. The second arises from a confusion between the power to change a lunatic's residence and the right to change his domicile.

(*v.*) *An Invalid*.—There is at first sight considerable difficulty in determining whether D., an Englishman, who resides abroad on account of his health, loses his English domicile or not. For there exists an apparent inconsistency between the different judicial *dicta* on the subject.

On the one hand, it has been laid down, that such a residence, being "involuntary," does not change D.'s domicile.

"There must," it has been said, "be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of "creditors, or the *relief from illness*" (*g*).

"A man might leave England with no intention of "returning, nay, with a determination never to return, "e.g., a man labouring under mortal disease, and told "that to preserve his life, or even to alleviate his sufferings, "he must go abroad. Was it to be said that if he went "to Madeira he could not do so without losing his character of an English subject—without losing the right "to the intervention of the English law in the transmission "of his property after his death and in the construction of "his testamentary instruments? Such a proposition was "revolting to common sense" (*h*).

This doctrine has been thus applied to a particular case: "If [D.] had gone for health to the island of Madeira, ". . . and had written letters, stating that she should "die there, and had given directions that she should be

(*f*) See *Story*, n. 506 note (1), and pp. 97, 100, *ante*.

(*g*) *Udny v. Udny*, L. R. 1 Sc. App. 441, 458, *per* Lord Westbury.

(*h*) *Moorhouse v. Lord*, 10 H. L. C. 272; 32 L. J. (Ch.) 295, 299, *per* Lord Kingsdown.

"buried there, although she had died and been buried there, unquestionably her Scotch domicile would never have been superseded" (i).

On the other hand, it has been maintained that if D. chooses to reside abroad with the intention of making the foreign country his residence permanently, or for an indefinite time, the fact that the motive of the change is health does not prevent D. from changing his domicile. In a case of this kind the law has been judicially expounded as follows:—

"That there may be cases in which even a permanent residence in a foreign country occasioned by the state of the health, may not operate a change of domicile, may well be admitted. Such was the case put by Lord Campbell in *Johnstone v. Beattie*, but such cases must not be confounded with others in which the foreign residence may be determined by the preference of climate, or the hope or the opinion that the air or the habits of another country may be better suited to the health or the constitution. In the one case, the foreign abode is determined by necessity; in the other, it is by choice. . . . In settling there [in Tuscany] D., it is decided, was exercising a preference, and not acting upon a necessity; and I cannot venture to hold that in such a case the domicile cannot be changed. If domicile is to remain unchanged upon the ground of climate being more suitable to health, I hardly know how we could stop short of holding that it ought to remain unchanged also upon the ground of habits being more suitable to fortune. There is in both cases a degree of moral compulsion" (k).

The apparent inconsistency between these doctrines may be removed, or explained, if we dismiss all reference to motive, to external necessity, and so forth; avoid the use of the misleading terms "voluntary" and "involuntary,"

(i) *Johnstone v. Beattie*, 10 Cl. & Fin. 42, 189, per Lord Campbell.

(k) *Hoskins v. Matthews*, 8 De G. M. & G. 28, 29; 25 L. J. (Ch.) 689, 695, per Turner, L.J.

and, recurring to the principle that residence combined with the purpose of permanent or indefinite residence, constitutes domicile, apply it to the different cases or circumstances under which a domiciled Englishman may take up a foreign residence for the sake of his health.

These cases are three:—

First case.—D. goes to France for relief from sickness, with the fixed intention of residing there for six months and no longer.

This case presents no difficulty whatever. D. does not acquire a French domicile any more than he does if he goes to France for six months on business or for pleasure. The reason why he does not acquire a domicile is that he has not the *animus manendi*, but the quite different intention of staying for a determinate time or definite purpose (*l*).

Second case.—D., finding that his health suffers from the English climate, goes to France and settles there, that is he intends to reside there permanently or indefinitely. D. in this case acquires a French domicile (*m*).

Here, again, there is no deviation from general principle. D. acquires a French domicile because he resides in France with the *animus manendi*.

Third case.—D. goes to France in a dying state, in order to alleviate his sufferings, without any expectation of returning to England.

This is the case which has suggested the doctrine that a change of residence for the sake of health does not involve a change of domicile. The doctrine itself, as applied to this case, conforms to common sense. It would be absurd to say that D., who goes to Pau, to spend there in peace the few remaining months of his life, acquires a French domicile. But the doctrine in question, as applied to this case, is in conformity, not only with common sense, but with the general theory of the law of domicile. D. does not acquire a domicile in France, because he does not go

(*l*) See p. 80, *ante*.

(*m*) This is precisely what *Hoskins v. Matthews* (25 L. J. (Ch.) 689, 8 De G. M. & G. 13) decides, and decides correctly.

to France with the intention of permanent or indefinite residence, in the sense in which these words are applied to a person settling in another country, but goes there for the definite and determinate purpose of passing in France the few remaining months of his life. The third case, now under consideration, is in its essential features like the first and not like the second of the cases already examined. If D. knew for certain that he would die on the day six months after he left England, it would be apparent that the first and third cases were identical. That the definite period for which he intends to reside is limited not by a fixed day, or by the conclusion of a definite piece of business, but by the expected termination of his life, can make no difference in the character of the residence. In neither the first nor the third case is the residence combined with the proper *animus manendi*.

In no one of the three cases we have examined is there any necessity, in order to arrive at a right conclusion, for reference to the motive, as contrasted with, what is quite a different thing, the purpose or intention of residence.

We may now see that the contradictory dicta as to the effect of a residence for the sake of health, do not of necessity imply any fundamental difference of opinion among the high authorities by whom these dicta were delivered. All these authorities might probably have arrived at the same conclusion if they had had the same circumstances before their minds.

The court which gave judgment in *Hoskins v. Matthews* (n) had to deal with the second of our supposed cases, and arrived at what, both according to common sense and according to theory, is a perfectly sound conclusion.

The dicta, on the other hand, of the authorities who lay down, that a residence adopted for the sake of health does not involve a change of domicil, are obviously delivered by persons who had before their minds the third, not the second, of our supposed cases. These dicta, again, embody

(n) 25 L. J. (Ch.) 639, 8 De G. M. & G. 13.

what, in reference to such a case, is, as we have shown, a perfectly sound conclusion. Their only defect is, that they are expressed in terms which are too wide, and which therefore cover circumstances, probably not within the contemplation of the authorities by whom they were delivered; and, further, that, while embodying a sound conclusion, they introduce an unnecessary and misleading reference to the motives which may lead to the adoption of a foreign domicile.

(vi.) *Officials generally*.—Official residence in a country is not in itself evidence of an intention to settle there, because all that can (in general) be inferred from such residence is that the official resides during the time and for the purpose of his office. This is clearly so when the office is for a limited period. There is no reason to suppose, from the fact of a domiciled Englishman becoming Lord Lieutenant of Ireland, or Governor-General of India (*o*), that he means to give up his English home or domicile. The presumption is strongly (if not conclusively) in favour of the intention to retain his English domicile.

Occasionally, however, official residence may be *prima facie* proof of a change of domicile. This is so when the office itself, from its tenure and nature, requires the official to make a home in the country where he resides. Thus, it has been suggested that if a domiciled Scotchman takes an English living, he may, on coming into residence, be assumed to have the intention of residing permanently in England, and hence to acquire an English domicile (*p*). Such a case is exceptional. As a rule, official residence is not a fact from which a change of domicile can be inferred, but much depends on the nature of the office.

(vii.) *An Ambassador* (*q*).—An ambassador who resides at a foreign court in general retains his existing domicile, which is, in most cases, the country which he represents.

(*o*) See *Attorney-General v. Pottinger*, 80 L. J. (Ex.) 284.

(*p*) See judgment of Lord Jeffrey in *Arnott v. Groom*, 1846, 9 D. 142.

(*q*) *Westlake*, s. 47; *Phillimore*, ss. 171—178; *Story*, s. 48; *Wharton*, s. 49.

The reason of this is obvious. The residence of an English ambassador in France does not raise the slightest presumption of his intention to make his home in France, and it is possible, though not certain, that the duties of an ambassador may be held absolutely incompatible with his *acquiring* a domicile in the country where he resides whilst he remains an ambassador.

An ambassador, however, if he is before his appointment already domiciled in the country where he resides as ambassador, retains his domicile in spite of his office, and this, though the domicile in the place of his residence is an acquired domicile, and the country which he represents is his domicile of origin. D., an Italian, acquires a domicile in England. He afterwards is appointed the representative of Italy at the English court. D. retains his English domicile (r). Though in short an ambassador or attaché does not in general acquire a domicile in the country where he resides, this is simply the result of his residence being in general unconnected with any intention to reside permanently. In a case where it was held that an attaché to the Portuguese Embassy retained the English domicile, which he had acquired before his appointment, the court say, "We are not saying that if a man should have continued an attaché for forty or fifty years, that he would thereby, *simpliciter*, acquire an English domicile, and that his property would be subject to legacy duty. We affirm nothing of the sort. What we do affirm is, that he, having acquired an English domicile, does not lose it *ipso facto*, without more, by taking this office of an attaché" (s).

(viii.) *A Consul*.—A consul does not and cannot be presumed to acquire a domicile by merely living in a country as consul. On the other hand, he does not, by becoming

(r) *Heath v. Samson*, 14 Beav. 441.

(s) *Attorney-General v. Kent*, 31 L. J. (Ex.) 391, 397, *per Bramwell*, B.

(t) *Udny v. Udny*, L. R. 1 Sc. App. 441; *Sharpe v. Crispin*, L. R. 1 P. & D. 611; *The Indian Chief*, 3 C. Rob. 12, 22; *Niboyet v. Niboyet*, 4 P. D. 1.

consul, lose any domicile he already possesses. The length of his residence as consul is immaterial (*t*).

D., an Englishman, resides at Leghorn for twenty years as English consul. D. does not acquire an Italian domicile.

(ix.) *A Person in Military or Naval Service*.—A soldier, &c., does not acquire a domicile in the place where he is stationed, but is domiciled in the territory of the sovereign whom he serves.

The first part of this principle results from the nature of modern military service. A soldier does not and usually cannot “settle,” or acquire a domicile in the place where he is stationed (*u*). For D., an English soldier, serving in Canada cannot, during his service, however long, settle in Canada.

The second part of this principle is not supported by many cases, but is, it is conceived, so far well established that we may presume, unless there is evidence to the contrary, that a soldier or sailor (in the naval service) is domiciled in the country of the sovereign whom he serves, *i.e.*, that he means to have his home within the territory of that sovereign, or at least not within the territory of any other power.

Hence the following results :—

(1) *A soldier or sailor in the service of his own sovereign retains the domicile which he had on entering the service, wherever he may be stationed.*

D., an Irish officer, though stationed in England, retains his Irish domicile of origin (*x*).

D., a Scotchman, entering the British army, retains his Scotch domicile, though stationed in the colonies (*y*).

(2.) *A person who enters the military or naval service of a foreign sovereign (probably) acquires a domicile in the country of such sovereign.*

(*u*) See judgment of Watson, B.; *Re Steer*, 28 L. J. (Ex.) 22, 26.

(*x*) *Yelverton v. Yelverton*, 1 Sw. & Tr. 574; 29 L. J. (P. & M.) 84.

(*y*) Compare *Attorney-General v. Napier*, 6 Ex. 217, 20 L. J. (Ex.) 173; *Brown v. Smith*, 15 Beav. 444, 21 L. J. (Ch.) 856, with *Craigie v. Lewin*, 3 Curt. 435.

D., a domiciled Englishman, enters the Russian army, and dies while serving in it. He, perhaps, may be presumed to have acquired a Russian domicile (z). A soldier or sailor who serves a foreign sovereign certainly does not acquire a domicile at the particular place where he is stationed.

A question has further been raised, and not settled, whether a soldier who retains his rank in the service of one sovereign can, even by residence combined with the *animus manendi*, acquire a domicile in a country subject to another.

The Privy Council thus express themselves on this point :

"We do not think it necessary for the decision of this case, that we should lay down as an absolute rule that no person being the colonel of a regiment in the service of the East India Company, and a general in the service of her Majesty, can legally acquire a domicile in a foreign country. It is not necessary, for the decision of this case, to go so far; but we do say that there is a strong presumption of law against a person so circumstanced abandoning an English domicile and becoming the domiciled subject of a foreign power" (a).

The matter becomes, in short, a question of evidence. There is the strongest presumption that D., who is in the service of the English Crown, does not, even though he resides in France, mean to reside there permanently, but this presumption probably might be rebutted by sufficiently strong evidence (b).

(x.) *A Person in the Indian Service.*—The rules established with reference to the domicile of persons in the

(z) See this statement made *arguendo* in *Somerville v. Somerville*, 5 Vesey 749a, 757, and apparently admitted by the court. Compare also cases such as *Craigie v. Lewin*, 3 Curt. 435, as to service under the East India Company, and *Westlake*, s. 44. There may be a difficulty in applying this doctrine in the case of states made up of several countries. See pp. 31, 32, *ante*.

(a) *Hodgson v. De Beauchessne*, 12 Moore P. C. 285, 319; *conf. Bremer v. Freeman*, 10 Moore P. C. 306.

(b) *Attorney-General v. Pottinger*, 30 L. J. (Ex.) 284, which, however, is not decisive.

service of the East India Company were peculiar (*c*), and are now admitted to have been anomalous.

(i.) A person in the military or covenanted service of the Company acquired a domicile in India (*d*).

(ii.) The domicile thus acquired was technically termed and considered an "Anglo-Indian domicile" (*e*).

Such a domicile was for testamentary purposes (to which the cases mostly refer) equivalent to an English domicile (*f*).

(iii.) The Anglo-Indian domicile was in general retained after a person's return to Europe as long as he continued in the service of the Company and liable to be recalled to India, but such continuance was not absolutely incompatible with the acquisition or resumption of another domicile, *e.g.*, in England (*g*).

(*c*) See *Phillimore*, ss. 154—162; *Savigny*, p. 59, note D., by Guthrie.

Bruce v. Bruce, 2 B. & P. 229.

Munroe v. Douglas, 5 Madd. 379.

Craigie v. Lewin, 3 Curt. 435.

Attorney-General v. Napier, 6 Ex. 217; 20 L. J. (Ex.) 173.

Forbes v. Forbes, 23 L. J. (Ch.) 724.

Hepburn v. Skirring, 9 W. R. 764.

Hodgson v. De Beaucheme, 12 Moore P. C. 285.

Attorney-General v. Pottinger, 30 L. J. (Ex.) 284.

Cockrell v. Cockrell, 25 L. J. (Ch.) 730.

Attorney-General v. Fitzgerald, 25 L. J. (Ch.) 743.

Allardice v. Onslow, 33 L. J. (Ch.) 434.

Jopp v. Wood, 34 L. J. (Ch.) 212; 4 De G. J. & S. 616.

The transfer of the Government of India to the Crown by the *Act for the better Government of India* (1858), and the Indian Succession Act, 1865, have deprived these cases of most of their practical importance; but they still deserve careful study on two accounts. First, because they may still determine the domicile possessed by persons living in India before 1858. Secondly, because they have influenced the views of domicile adopted by our judges, and until the rules established by these cases were admitted to be exceptional, it was impossible to form any consistent theory as to the nature of domicile. *Definition of Domicil*, App., Note I. It is not certain that these cases do not apply to domicile acquired in India since 1866. See the Scotch case, *Wauchope v. Wauchope*, June 28, 1877, 4 R. 945.

(*d*) See cases cited in foregoing note.

(*e*) As to expression "Anglo-Indian domicile," see judgment of Lord Cranworth, *Moorhouse v. Lord*, 32 L. J. (Ch.) (H. L.) 295, 298.

(*f*) *Bruce v. Bruce*, 2 B. & P. 229.

Munroe v. Douglas, 5 Madd. 379.

(*g*) *Attorney-General v. Pottinger*, 30 L. J. (Ex.) 284.

(iv.) The rules as to an Anglo-Indian domicil did not apply either to persons residing in India for the sake of business (*h*), or to persons in the service of the Crown, and stationed in India (*i*).

These rules worked as follows:—D., a domiciled Scotchman, went to India as a military officer or a surgeon in the service of the Company. Whilst in India, or during a return on furlough to Scotland, he made his will, and died, say, in the year 1850. The will was made in accordance with the forms required by Scotch law, but not in accordance with the forms required by English law. The will was invalid. D., in virtue of his Anglo-Indian domicil, was in effect considered a person domiciled in England, and the validity of his will was determined on the principles applicable to the will of a domiciled Englishman.

The rules as to Anglo-Indian domicil are in two respects anomalous. *First*.—A soldier, &c., stationed in India acquires under them a domicil in the country where he is stationed (*k*). *Secondly*.—A person is held domiciled in a country where he certainly does not, in ninety-nine cases out of a hundred, intend to make his permanent home, and, therefore, where he would not in any other case be held to be domiciled (*l*).

The explanation of the anomaly is not far to seek. “At the time when those cases [on Anglo-Indian domicil] were decided, the government of the East India Company was, in a high degree, if not wholly, a separate and independent government, foreign to the government of this country; and it may well have been thought that persons who had covenanted obligations with such government for service abroad, could not reasonably be considered to have intended to retain their domicil here. *They in fact became as much estranged from this country,*

(*h*) *Jopp v. Wood*, 34 L. J. (Ch.) 212.

(*i*) *Attorney-General v. Napier*, 6 Ex. 217, 20 L. J. (Ex.) 178.

(*k*) See p. 139, *ante*.

(*l*) *Conf. language of Kindersley, V.C.; Allardice v. Onslow*, 38 L. J. (Ch.) 434, 436.

"as if they had become the servants of a foreign government" (m).

A servant of the Company gained an Anglo-Indian domicile, not because he was stationed in India, but because he entered into the service of what may be termed an Anglo-Indian power. This explains the fact that neither merchants nor persons in the military service of the Crown were ever held to acquire an Anglo-Indian domicile.

(xi.) *An Ecclesiastic*.—A clergyman possessed of a cure must (it is said) be held domiciled at the place of his cure (n).

The most that can be laid down is, that there is a strong presumption in favour of his intention to reside there permanently. There is no reason to suppose that if the fact were otherwise the presumption might not be rebutted.

(xii.) *A Servant*.—A servant (it is sometimes laid down) has the domicile of his master.

Unless, however, domicile be identified with residence, there is not any authority in English law, or anything in the circumstances of modern life, establishing a definite rule, or even a presumption, as to the domicile of a servant. Whether he has, or has not, a "permanent home" in the same country as his master must, as in other cases, depend upon the combination of fact and intention. The nature of the service may, under some circumstances, tell in favour, and in others against a presumption, that the servant adopts his employer's domicile (o).

(xiii.) *A Student*.—There is certainly in English law nothing to justify any peculiar rule or presumption as to the domicile of a student.

(m) *Jopp v. Wood*, 84 L. J. (Ch.) 212, 219, per *Turner*, L.J.

(n) *Phillimore*, s. 184. See, however, as to corporate character, p. 112, *ante*.

(p) Contrast, for example, the position of a Scotchman settled as a gardener in England, with that of a Frenchman, employed as courier by an English family, travelling abroad on the Continent. See *Westlake*, s. 43; *Phillimore*, ss. 140—148.

Remarks
on fore-
going
cases.

As to the domicile of the foregoing classes of persons, the following points may be noticed :

First.—Several of the cases enumerated, such, *e.g.*, as that of an ecclesiastic, a servant, or a student, present, in fact, no peculiarity whatever. The legal home of these persons is clearly fixed in accordance with the ordinary principles of the law of domicile.

Secondly.—The other cases have most of them this feature in common, that each of the persons, such as a prisoner, or an ambassador, has a residence in one place, and a domicile in another ; and, further, that the residence exists under circumstances which preclude any presumption in favour of the existence of a domicile at the place of residence, but this will be found to result not from any special rule of law fixing the domicile of the persons in question, but from the fact that the circumstances of their respective positions, either, as in the case of a prisoner, make the existence of the *animus manendi* impossible, or, as in the case of an exile, render its existence improbable. It is, of course, true that a person who is residing in a country, where for any reason he cannot or does not acquire a domicile, is, in accordance with the general rules of the law of domicile, unable to change the domicile which he possessed on coming to the country where he resides (*q*), but his domicile is in no special sense determined by law, and cannot, therefore, be termed with any strictness of language a necessary domicile.

Thirdly.—It is often said that the reason why, in some of the cases under consideration, and in others which might be mentioned, residence does not produce domicile is that the residence is “involuntary,” or “under compulsion” (*r*).

What is intended by these expressions is no doubt true, *viz.*, that where residence cannot be, or is not, a consequence or a result of a purpose or intention to reside

(*q*) See Rules 5—8, pp. 67—86, *ante*.

(*r*) *Conf. e.g. Westlake*, s. 52, and the language of Lord Westbury, *Udny v. Udny*, L. R. 1 Sc. App. 441, 458.

indefinitely (*animus manendi*), there cannot be a change of domicile; but the terms "involuntary," or "under compulsion," are so ambiguous, and so closely connected with logical and metaphysical problems, that they may lead, and have in fact led to confusion (s). Hence it has been laid down that, "there must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness" (t), whence it might be inferred that the effect of residence in producing a change of domicile depends not upon the presence or absence of the *animus manendi*, but upon the motive for the residence. This doctrine, which has already perplexed the discussion of the effect of residence abroad for the sake of health, must, unless rejected, lead to still further perplexity. It at once, for example, suggests the enquiry whether an Englishman, who resides abroad for the sake of economy, and therefore in one sense against his will, acquires a foreign domicile. This question, and the like enquiries, which can never be answered by a reference to motive, are disposed of by adhering to the sound principle that residence and the *animus manendi* are the sole constituents of domicile. If these exist the motive for the residence becomes immaterial. The only way in which consideration of a person's motive for dwelling in one place rather than in another can be important is from its effect as evidence for the existence or non-existence of the *animus manendi*. In all the cases mentioned, of residence induced, *e.g.*, by desire to escape from illness, or by the necessity for performing official duties, it is only as evidence of intention that motive is of importance. If this once be perceived, it will be found best, as already suggested, to avoid as far as possible all reference to the question whether residence be voluntary or involuntary, except in so far as a man's willingness or unwillingness to reside in a country may be proof of his

(s) See *Definition of Domicil*, App., Note I., for the perplexity introduced thereby into the subject of the meaning of domicile.

(t) *Udny v. Udny*, L. R. 1 Sc. App. 441, 458, per Lord Westbury.

intending or not intending to make it his permanent dwelling place.

Fourthly.—When the term involuntary, or under compulsion, is got rid of, and the true relation between motive and residence is perceived, we see how it happens that official residence is referred to, sometimes as a reason against, and sometimes as a reason for, assuming the acquisition of domicile (*u*).

We have here to deal with a question of evidence. If the “official residence” is residence for a limited time, or for a special purpose, as in the case of a Governor-general of India, the nature of the office does away with the presumption in favour of the existence of the *animus manendi*. If, on the contrary, the office is one such as an ecclesiastical cure, which under modern arrangements requires a clergyman to make his home permanently in his parish, then the nature of the office adds to the strength of the presumption that he intends to make his home where he resides.

General
observa-
tion as to
evidence of
domicil.

One general observation as to the evidence of domicile deserves attention, viz., that according to modern decisions, there is scarcely any one circumstance in a man's life which is in itself absolutely conclusive in determining his domicile. This requires to be noted, because the earlier writers on the subject show a tendency to treat matters, which are only strong evidence, as being decisive criteria of domicile. Thus it is sometimes laid down that a man has his domicile in the country which he chooses as the residence of his wife and family, and the fact that D., who lives sometimes in Scotland and sometimes in England, never takes his wife to Scotland, but keeps a house in London, where she always lives (*x*), and he when in England resides with her, is stated to be conclusive evidence of D.'s having an English domicile. This

(*u*) See *Udny v. Udny*, L. R. 1 Sc. App. 441, 458. *Westlake*, s. 44.

(*x*) *Forbes v. Forbes*, 23 L. J. (Ch.) 724; *Kay*, 341. See *Aitchison v. Dixon*, L. R. 10 Eq. 589.

statement appears, according to modern decisions, to be erroneous. The fact that D.'s wife resides in London is strong evidence that D. intends to make London his home or domicile, but it is evidence which may be rebutted, and there is no ground for laying down an absolute rule that a man is necessarily domiciled in the country where his wife and family reside. A similar criticism applies to the rule sometimes suggested that a person, *e.g.*, an English peer (y), must be taken to be domiciled in the country to which he is tied by his political or official duties. In this, and in every other similar case, the fact that a man is bound in duty to reside in a particular place or country is evidence, in the absence of proof to the contrary, of an intention to reside there, but it is no more than evidence, and in modern times the courts have shown a marked disposition to look upon the question of domicile as a mere question of fact, to be determined not by general considerations as to the place where a person ought to reside, but by the actual circumstances of each particular case.

(y) See *Hamilton v. Dallas*, 1 Ch. D. 257.

PART III.

LEGAL EFFECTS OF DOMICIL (*a*).

A large number of rights are affected by the law of domicile. They are, that is to say, determined with reference to the law of the country where some person is or has been domiciled. A large number of rights on the other hand, such, for example, as rights to immoveables or land, are quite unaffected by such law.

The object of the rules in this Part (*b*) of this treatise is first to determine what are the rights which are not (*c*) affected by the law of domicile, and which, therefore, may be excluded from our consideration; secondly, to state what are the rights which are or may be affected by the law of domicile (*d*), and, lastly, this point being ascertained, to define the extent to which each of the rights which in any way depends on the law of domicile is affected by or subject to that law (*e*).

It may be well distinctly to point out, what however it is hoped is apparent throughout the whole of this work, that the rules stated in it are the rules put in force by English courts. Whether the same rules are or are not adopted by the courts of other countries is a question with which the present treatise has no direct concern.

(*a*) *Story*, ss. 50—230*e*, 374—423*h*, 464—512.

Westlake, ss. 397—407, 260—373.

Phillimore, ss. 381—384, 390—564, 581—592, 757—779, 858—879.

(*b*) Rules 20—73, pp. 150—329.

(*c*) Rule 20, p. 150, *post*.

(*d*) Rules 21, 22, pp. 153, 157, *post*.

(*e*) Rules 23—73, pp. 159—329, *post*.

CHAPTER I.

RIGHTS AFFECTED BY THE LAW OF DOMICIL.

Rule 20. **RULE 20.**—The law of domicile does not affect
Rights not in respect of
affected by
domicil.

- (1) immoveables (a) ;
- (2) contracts (with the exception of marriage,
and contracts (b) having reference to
marriage) ;
- (3) torts ;
- (4) procedure.

(1) Im-
moveables. All questions whatever connected with immoveables, or in popular language land, are determined by the *lex situs* (c), i.e., by the law of the country where the land is situated. "The general principle of the [English] common law is, that the laws of the place where such [immoveable] property is situate, exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them" (d). The capacity or incapacity also to take or transfer such property depends (according to English law (e)) on the *lex situs*, and not upon the *lex domicilii*.

(a) See for meaning of immoveables, pp. 30, 36—39, *ante*.

(b) See Rules 60—62, pp. 268—276, *post*.

(c) See for meaning of *lex situs*, pp. 30, 36, *ante*.

(d) *Story*, s. 424. See ss. 428, 434, 436, 454, 463. *Birtwhistle v. Vardill*, 2 Cl. & F. 571.

(e) This should be noted, because foreign jurists, while agreeing with the principle that the transfer, acquisition, &c., of immovable property depends on the *lex situs*, generally hold that all questions of capacity depend on the person's *lex domicilii*. See e.g., *Savigny*, s. 362, pp. 104—109.

D., a domiciled Scotchman (*f*), born before but legitimated by the marriage of his parents, is capable, according to Scotch law, of being heir to immoveable property. According to English law, a person born before the marriage of his parents, is not capable of inheriting immoveables. D. cannot inherit English real estate (*g*).

D., domiciled in France, sells an English estate to A. The sale is invalid if it does not comply with all the requirements as to form and otherwise of English law (*h*).

The *formal validity* of a contract, *e.g.*, whether it must ^{(2) Con-} be made by deed or not, depends on the law of the country ^{tracts.} where the contract is made (*i*). For the form required for a contract by the law of the place where it is made is both sufficient and requisite for its validity in England (*k*).

The *effect* of a contract, so far as it depends on rules of law, is regulated by the law which the parties are presumed to have looked to in making the contract. Where the contract is to be performed in the country where it is made, the law which they had in view is in general at any rate the law of that country. Where a contract is made in one place, and is to be performed in another, *e.g.*, made in Italy and to be performed in England, the parties are in

(*f*) See, as to the expression "domiciled Scotchman," &c., p. 60, note (*x*), *ante*.

(*g*) *Birtwhistle v. Vardill*, 2 Cl. & F. 571. See Rule 35, p. 181, *post*.

(*h*) *Rules as to Immoveables*, App., Note. IV.

(*i*) See *Story*, s. 242.

(*k*) *Westlake*, ss. 171, 173. This is not inconsistent with *Leroux v. Brown*, 12 C. B. 801, 22 L. J. (C. P.) 1. This case only decides that the 4th section of the Statute of Frauds applies to procedure, and that, therefore, no action can be brought in England on any contract within the terms of the 4th section which, though made abroad, is not in writing.

Foreign jurists appear to hold that foreigners travelling in a country where they are not domiciled have often the option of contracting either according to the forms required by the law of the place where the contract is made (*lex loci contractus*), or according to the law of the country where they are domiciled (*lex domicilii*): *Savigny*, s. 381, pp. 265—272; *Bar*, ss. 34—38. The view of English courts is that the use of the form prescribed by the law of the place where a contract is made is not optional but imperative.

many cases taken to have contracted with a view to the law of the place of performance. "Where the contract," it has been laid down, "is, either expressly or tacitly, to be performed in any other place [than that where it is made] there the general rule is in conformity to the presumed intention of the parties that the contract as to its validity (l), nature, obligation, and interpretation is to be governed by the law of the place of performance" (m). But it may be that a contract is to be taken to be governed by the law of some place other than either the place where the contract is made or the place where it is to be performed, if from the expression or acts of the parties it may be reasonably inferred that they contracted with a view to the law of such other country (n).

- (3) *Torts.* The right to bring an action for a tort (e.g., an assault or a libel) is in no degree affected by the *lex domicilii*, either of the person wronged or of the wrongdoer, but depends on the combined effect of the law of the country where the wrong is done, and of the law of the country, viz., England, where the action is brought. For no action can be maintained in an English court in respect of a tort or wrong which is not an offence, both by the law of the place where it was committed, and by the law of England.

X., for example, assaults A. in France, under circumstances which would expose him to an action if the assault had taken place in England, but which do not make him guilty of any offence in France. A. cannot maintain an action against X.

X. uses in France insulting language about A., which renders X. liable to proceedings in a French court, but which if used in England would not render him liable to an action in an English court. A. cannot maintain an action against X.

An action can, however, be maintained in an English

(l) In so far as this does not depend upon its form.

(m) *Story*, s. 280. See s. 263.

(n) *Lloyd v. Guibert*, 6 B. & S. 100, L. R. 1 Q. B. 115.

court for an act done in France, which is an offence by French law, and which would if done in England be an offence against English law (o).

All questions connected with procedure are decided by the law of the country in which the action is brought (*lex fori*) (p), and our courts give a very wide sense to the term "procedure," including in it, for example, the question whether an action is or is not barred by a statute of limitations.

RULE 21.—The law of domicile affects rights in respect of

- (1) *status*, or personal capacity (q);
- (2) marriage (r);
- (3) divorce (s);
- (4) moveables (t).

Rights
affected by
domicil.

The law of domicile affects, though it does not wholly govern, the rights enumerated in this rule.

Every person has a certain civil *status*, consisting of his capacity for the acquisition and exercise of legal rights, and for the performance of legal acts. Thus D.'s *status* or personal condition may be that of the ordinary or average citizen, who is of full age, legitimate, unmarried, and so forth, and has incurred no legal disability. Such a person has in England the capacity to inherit, to make a will, to bind himself by contracts, to change his domicile, and the like. His *status*, just because it is the average or ordinary condition, receives no special name. D.'s condition or

(o) See *Phillips v. Eyre*, L. R. 4 Q. B. 225, 237; *Ibid.*, L. R. 6 Q. B. 1 (Ex. Ch.); *The Halley*, L. R. 2 P. C. 193; *The Moxham*, 1 P. D. 107; *Dacey on Parties to an Action*, p. 57.

(p) *Story*, s. 558.

(q) See Rules 23—43, pp. 159—199, *post*.

(r) See Rules 44—45, pp. 200—224, *post*; and also Rules 60—62, pp. 268—276 *post*.

(s) See Rules 46—48, pp. 225—243, *post*.

(t) See Rules 59—72, pp. 266—316, *post*.

status, on the other hand, may differ from the ordinary standard, in that he has legal capacities, which either fall short of, or exceed those of, the ordinary citizen, so that he occupies a position, by virtue of which, as it has been expressed (*u*), what is law for the average citizen is not law for him. Thus, if he is illegitimate, he does not inherit in cases in which the average citizen would do so. If he is an infant he is not bound by contracts which bind others. If he is married he has rights, and incurs liabilities beyond those of the ordinary or average citizen. As D.'s position is in these instances marked off from, and contrasted with the condition of ordinary citizens, it receives a name such as that of illegitimacy, infancy, &c., and is clearly recognised as a *status*. In either case, D. has a *status* which may, in very general terms, be described as being "the legal position" of [D.] in or with regard to the rest of a community" (*x*).

From the nature of *status* it is apparent that the term is a relative one, varying according to the laws of different communities. D., for example, may be legitimate if his *status* is to be determined by the law of France, illegitimate if it is to be determined by the law of England. In no matter moreover do the laws of different countries differ more widely than in their rules as to *status*. Conditions, such as that of slavery, infancy, monastic celibacy, or civil death, which are known to the law of one state are unknown or absolutely repugnant to the legal system of another. Conditions, again, which in one form or another exist throughout the civilized world, are in different countries governed by different rules, and involve different incidents. Minority, to take one example, may terminate under one law at eighteen, under another at twenty-one, under a third at twenty-five (*y*), and it may safely be asserted, that in

(*u*) See *Westlake*, s. 89.

(*x*) *Niboyet v. Niboyet*, 4 P. D. 1, 11, per Brett, L. J.

(*y*) The age of majority is in England, France, Italy, Bavaria, Saxony, Russia, twenty-one; in Hesse twenty-two; in Holland twenty-three; in Austria twenty-four; in Prussia, Wurtemberg, Brunswick, Denmark, Spain, Portugal, Mexico, and Norway twenty-five. See *Fiorc*, p. 295, and *Levi International Commercial Law*, pp. 20, 22.

almost every different country the incapacities or the privileges of a minor are somewhat different.

When, therefore, it is necessary to determine what is a person's *status*, and how far his rights or acts are affected thereby, it is necessary, further, to determine what is the law with reference to which his *status* or condition must be fixed. Whether our courts have on this subject adopted any one invariable principle, may be doubted (z), but they have, of recent years, gone so far as to hold that an individual's legal condition is, in many cases, liable to be affected by the law of his domicile (a), and, perhaps, may be said to have adopted in a very general way the rule that *status* depends *prima facie* on domicile, though in practice the rule is subjected to limitations and exceptions which often go near to invalidating it (b).

Marriage is a contract which involves a change of *status*, 2. Marri- and probably on this account English courts have in this ^{age} case adhered to the principle which they have not fully maintained in other instances, that *capacity* to contract being a question of *status* depends on the law of the contractor's domicile, and hence that a person cannot contract in another country a marriage which he or she is incapable of contracting by the law of his or her domicile (c).

Marriage being a contract, the formal requisites of the contract are, as in other cases, subject in general to the *lex loci contractus* (d).

The result is that the validity of a marriage with the rights depending on its validity is governed by two different

(z) See further, pp. 163—168, *post*.

(a) See *Sottomayor v. De Barros*, 3 P. D. 1; *Udny v. Udny*, L. R. 1 Sc. App. 441.

(b) See *Male v. Roberts*, 3 Esp. N. R. 163.

(c) See Rule 44, p. 200, *post*. *Brook v. Brook*, 9 H. L. C. 193; *Sottomayor v. De Barros*, 3 P. D. 1, and notice that the cases in which it has been held that the consents of parents, &c., belong to the formalities of the marriage may be wrongly decided, but do not affect the principle that capacity to contract depends on the law of domicile.

(d) See p. 151, *ante*, Rule 44, p. 200, *post*, and Rule 45, p. 217, *post*.

laws—viz., first, by the law of the parties' domicile which determines their *capacity* to contract; secondly, by the law of the place where the marriage is celebrated, which determines in general the *formal requisites* of the marriage.

3. Divorce. The connection between divorce and the law of domicile is peculiar.

The effect of a divorce is to change the *status* of both the divorced persons. The question, therefore, arises, what are the courts which have jurisdiction, or, in other words, the right to effect such a change of *status*? The doctrine that *status* depends upon the law of a person's domicile supplies the answer, and suggests (if it does not necessitate) the conclusion that jurisdiction in matters of divorce belongs to the courts of the country where the parties are domiciled, and, in general, to these courts only, and this is the conclusion at which, subject to considerable limitations and exceptions, our courts have arrived (*e*). The rule that jurisdiction in divorce depends exclusively upon domicile involves, as far as it is maintained, the doctrine that the right to divorce depends upon the law of the domicile of the parties at the time of the divorce.

4. Moveables.

The general relation between rights over moveables (*f*) and the *lex domicilii* may in very general terms be stated as follows:—

First.—Capacity for the assignment of moveables depends in general (*g*) on the law of the owner's domicile.

Secondly.—When a person's moveable property is or may be assigned or transferred as a whole, as in the case of marriage, bankruptcy, or death, the effect of the transaction or event which causes or may cause such transfer is

(*e*) See Rule 46, p. 225, *post*. Compare *Wilson v. Wilson*, L. R. 2 P. & D. 435; *Firebrace v. Firebrace*, 47 L. J. (P. D. & M.) 41, with *Niboyet v. Niboyet*, 4 P. D. 1. See also *Theories of Divorce*, App., Note VI.

(*f*) See especially Rules 49—52, pp. 244—249, *post*, and Rule 59, p. 266, *post*.

(*g*) This statement must, however, as regards the individual assignment of a moveable, for example, by a sale, be taken subject to the rule that a title acquired in accordance with the law of a place where a moveable is situated (*lex situs*) is valid. See Rules 55—57, pp. 255—264, *post*.

(subject to considerable exceptions) determined by the law of the owner's domicile (*h*).

These are the cases to which the maxim *mobilia sequuntur personam* applies. It is a brief form of stating the principle that a person's moveable property is for many purposes, and especially when it is dealt with as a whole, considered by a fiction of law as situated in the country where its owner is domiciled, and therefore subject to the laws of such country. Thus, if D., an Englishman, domiciled in Paris, dies intestate in London, the furniture of his house in London is distributed by our courts in accordance with French law (*i*); that is, it is dealt with as the French courts would deal with the goods of an Englishman domiciled in France if the goods were, in fact, situated in Paris at the time of his death.

Thirdly.—The law of domicile affects, though only to a slight degree, the individual assignment of moveables, as, for example, by gift or sale (*k*). The effect, however, of such a transaction is mainly governed not by the law of domicile, but by the law of the country where a thing is situated (*lex situs*) (*l*).

RULE 22.—The law of domicile affects the rights of the Crown to legacy duty, or to succession duty, in respect of a deceased person's moveables (*m*).

Rule 22.

Taxes on
succession
affected by
domicil.

When a statute gives the Crown a right to duties, the Act may itself define either in express terms or by necessary implication who are the persons whose property it is

(*h*) See Rule 59, p. 266, *post*.

(*i*) Rule 66, p. 291, *post*.

(*k*) See Rule 50, p. 245, *post*.

(*l*) See Rules 55—57, pp. 255—264, *post*.

(*m*) The rights dealt with throughout the greater part of this work are the rights of subjects, whether of the same sovereign or of different sovereigns, against or in respect of each other. The rights mentioned in this rule are rights of the Crown against or in respect of individuals. The two classes of rights are of a different character, and belong to different departments of law. They are each, however, affected by the law of domicile.

intended to charge with a tax. When such a definition is given, no ground exists for making the tax depend upon domicile (*n*). A statute may, however, not supply such a definition. This is the case with the Acts imposing legacy and succession duties. Under such circumstances the courts have to discover the intention of the legislature and determine who are the persons whose property is intended to come within the provisions of the Act. Though the word domicile is never mentioned in the Acts imposing legacy duty and succession duty, the courts have held that, as regards moveables, these Acts are intended to apply to the moveable property of those persons, and, with some exceptions, of those persons only who die domiciled within the area to which the Acts apply—viz., the United Kingdom. Hence, liability to legacy duty or succession duty depends, as regards moveables in the main, upon the fact whether the owner does or does not die domiciled in the United Kingdom (which is, for the present purpose, one country or law district), and does not depend upon the actual situation of the moveables, the place where the owner dies, or the country where the successor is domiciled (*o*).

(*n*) See, e.g., as to income tax, 16 & 17 Vict. c. 34, s. 1, Sched. D. *Attorney-General v. Coote*, 4 Price 183.

(*o*) See further, Rule 73, and see pp. 318—329, *post*, for several different grounds on which the connection between liability to the payment of duties and domicile is placed. The same principle is applied by our courts to Colonial Acts imposing succession duties. See *Platt v. Attorney-General for New South Wales*, 3 App. Cas. 336; *Peter v. Stirling*, 10 Ch. D. 279.

CHAPTER II.

STATUS (a) OR PERSONAL CAPACITY GENERALLY.

RULE 23.—Any *status* existing under the law of a person's domicile is recognised as regards all transactions taking place wholly within the country where he is domiciled (b).

Rule 23.

Status recognised as to transactions in country of domicile.

Our courts recognise every kind of *status* or personal condition held under the law of a country where a person is domiciled, in so far as such *status* affects acts done and rights exercised wholly in that country. Hence it has been laid down with substantial accuracy that "the *status* of persons with respect to acts done and rights acquired in the place of their domicile, and contracts made concerning property situated therein, will be governed by the law of that domicile; and that England . . . will hold

(a) See as to *status*, *Westlake*, ss. 397—407; *Story*, ss. 50—106; *Phillimore*, ss. 365—389, 522—564; *Wharton*, ss. 84—126; *Savigny*, ss. 362—365, pp. 104—129, and a. 380, p. 250; *Bar*, ss. 40—55.

(b) Compare *Phillimore*, s. 381; *Wharton*, s. 125. *Folliott v. Ogden*, 1 Hy. Bl. 123, throws some doubt on the principle of this rule if carried out to its full extent. This, however, is explained by *Ogden v. Folliott* (in error), 3 T. R. 726, by which it seems that the real ground of decision was that the confiscation by the state of New York being made during the rebellion was held by our courts inoperative, even as regards property in New York. See judgment of *Kenyon*, C.J., 3 T. R. 731; *Newton v. Manning*, 1 Mac. & G. 362, 364.

"as valid or invalid *such* acts, rights, and contracts, "accordingly as they are holden valid or invalid by the "law of the domicile" (c).

This clearly is so as regards any person domiciled in England. The transactions of such a person in England are, in so far as they may be affected by *status*, governed by English law. If D., for example, is a Frenchman domiciled in England, his capacity to contract in England depends on English law without reference to the law of France (d).

The same principle applies to persons domiciled in a foreign country. English courts may refuse to adjudicate upon transactions taking place in such country (e). If, however, an English court undertakes to determine the effect of acts done and rights exercised in a foreign country where a person is domiciled, the court will recognise the effect of his *status* under the law of his domicile, without any reference to what would have been the *status* of such a person in England, or to what might or might not be the effect of his foreign *status* on transactions taking place in any other country than that of his domicile.

Minority, for example, lasts in Prussia till the age of twenty-five. If, therefore, D., who is of the age of twenty-two and is domiciled in Prussia makes a gift, or sells goods, or enters into a contract at Berlin, the effect of the transaction will be judged of by our courts with reference to whatever be the privileges or incapacities of a minor under Prussian law. So, again, though civil death is not now known to our law (f), its effects on the rights of a person affected by it

(c) *Phillimore*, s. 381.

(d) In many of the cases falling under this rule the *lex actus* (or law of the country where a transaction takes place) and the *lex domicilii* are the same. It is, therefore, difficult to say for certain whether the character of the transaction is determined by our courts with a view to the *lex actus* or the *lex domicilii*. Still the law of domicile would appear really to be the guiding consideration.

(e) See, for example, the rule as to torts committed abroad, pp. 150, 152, *ante*.

(f) See 1 *Black. Comm.*, pp. 132, 133 ; 1 *Coke Litt.* 132.

in the country where he is domiciled will be noticed by our courts. If, for example, under the law of Spain, the property of a person who becomes a monk should devolve say on his heir, English law would recognise the fact of the property in Spain of a person there domiciled having through his taking monastic vows devolved upon his heir. In other words our courts would (it is conceived) to this extent at any rate recognise the effect of the monastic *status* (*g*).

RULE 24.—Transactions taking place in Eng- Rule 24.
land are not affected by any *status* existing under Transac-
tions in
England
when not
affected by
foreign
status.
foreign law, which either

- (1) is of a kind unknown to English law ; or
- (2) is penal (*h*).

The law of England will not allow any *status* which is Status
unknown
to English
law.
unknown to English law to have legal effects in England. Thus, even at the time when slavery existed in the English colonies the *status* of a slave was not recognised in England, and a master who brought his slave there lost the rights of ownership over him whilst in England (*i*). "Slavery," it was laid down, "is a local law, and therefore, "if a man wishes to preserve his slaves let him attach "them to him by affection, or make fast the bars of their "prison, or rivet well their chains, for the instant they get "beyond the limits where slavery is recognised by the local "law they have broken their chains, they have escaped "from their prison and are free" (*j*). On similar grounds, English courts will not in England give effect to a

(*g*) Compare *Santos v. Midge*, 29 L. J. (C. P.) 348, 8 C. B. N. S. 861 (Ex. Ch.). The case does not directly bear on the law of domicil, but is noticeable as showing the extent to which English courts will in regard to transactions in a foreign country recognise the existence of conditions such as slavery unknown to English law. See also the American case of *Polydore v. Prince*, Ware, 402.

(*h*) See *Story*, ss. 91, 92, 94—104, 620—625c ; *Wharton*, ss. 105—109. As to how far the last clause of the rule will apply to countries subject to the British Crown, *quære*.

(*i*) *Somerett's Case*, 20 ; *Howell's State Trials*, 1. See *The Slave Grace*, 2 Hagg. Adm. Rep. 94.

(*j*) *Forbes v. Cochrane*, 2 B. & C. 448, 467, *per Best*, J.

polygamous marriage (*k*). Nor will they give any effect in England to disabilities arising from religious vows, from religious belief (as, for instance, where Jews or Protestants are under disabilities by the law of their domicile), or from "civil death," or "infamy" (*l*).

All these are instances, and others might be given, of conditions which, as being foreign to English law are not recognised by our courts. Many of them are also examples of what we have termed a penal *status*, the effect of civil death or infamy being to deprive the person affected with it of his rights, and, therefore, might be brought under the second branch of the rule.

**Penal
status.**

A penal *status* means one which is imposed upon a person in order to deprive him of rights or to inflict punishment upon him, as where D. is affected with attainder. Such a penal *status* though inflicted by the law of the country where D. is domiciled, and though known to English law will not be allowed to affect D. as regards his rights to property in England.

"It is a general principle that the penal laws of one country cannot be taken notice of in another" (*m*). "I would," says Lord Loughborough, "even go farther, and say, a right to recover any . . . specific property, such as plate, or jewels in this country, would not be taken away by the criminal laws of another. The penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be seized by virtue of their authority: a fugitive who passes hither, comes with all his transitory rights; he may recover money held for his use, stock, obligations, and the like; and cannot be affected in this country, by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend" (*n*).

(*k*) *Hyde v. Hyde*, L. R. 1 P. & D. 180.

(*l*) See *Story*, ss. 91, 92, 620—624; 1 *Black. Comm.* 182, 183.

(*m*) *Ogden v. Folliott*, 3 T. R. 726, 733, *per Buller*, J.

(*n*) *Folliott v. Ogden*, 1 H. Black. 123, 185. See also *Wolff v. Ozholm*, 6 M. & S. 92, 99; compare *Lynch v. Provisional Government of Paraguay*, L. R. 2 P. & D. 268.

RULE 25.—In cases which do not fall within Rule 24, the existence of a *status* existing under the law of a person's domicil, is recognised by English courts, but such recognition does not necessarily involve the giving of effect to the results of such *status* (o). Rule 25.
How far
former
status re-
cognised.

Three opinions at least may be held as to the relation between a person's *status*, or personal capacity, and the law of his domicil. Three
opinions as
to *status*.

First view.—A person's *status* depends (subject to certain exceptions coinciding in the main with cases falling under Rule 24) wholly on the law of his domicil. (1) *Status*
depends
wholly on
lex domi-
cilii.

This is the view maintained by many foreign jurists, and notably by Savigny (p).

According to this opinion a person who is legitimate, an infant, &c., by the law of his domicil, is to be considered as legitimate, an infant, all the world over. Thus, if D., a person domiciled in Scotland, is legitimate by the law of Scotland, he ought, though born out of lawful wedlock (q), to be considered legitimate in England. So a person domiciled in Prussia who is of the age of twenty-two should be considered a minor in England till twenty-five, and on similar grounds an Englishman of twenty-two ought to be considered of full age in Prussia.

From this view the consequence logically follows that not only the fact of a person having a particular *status*, e.g., of legitimacy, but also all the legal effects of such *status* ought to be everywhere determined by the law of his domicil. If, for example, D. is legitimate under the law of his Scotch domicil on account of his parents having married after his birth, he not only ought to be considered legitimate in England, but ought also (though he would be illegitimate according to English local law) to possess

(o) For the authorities in support of this rule, see the authorities given in support of the rules as to particular kinds of *status*.

(p) *Savigny*, s. 382, p. 104.

(q) See Rule 35, p. 181, *post*.

in England all the privileges of legitimacy, both as to the inheritance of real estate and otherwise.

A person's civil *status* in short ought, on this view, to be "governed universally by one single principle, namely, "that of domicile, which is the criterion established by law "for the purpose of determining civil *status*" (r).

This principle has never been fully accepted by our courts, though of recent years they have shown a marked inclination to adopt it (s).

(2) *Status*
under law
of domicile
not recog-
nized in
other
countries.

Second view.—No *status* conferred only by the law of a person's domicile is to be recognised as regards transactions taking place in another country.

This view is, in its most extreme form, the exact opposite of the first theory. If it were completely carried out, it would make *status* a matter purely of local law. No civilised state has ever fully adopted it, and English courts have certainly never gone the length of applying it, at any rate in its full extent, to the *status* of persons domiciled in England.

Eminent writers have, however, held that the view now under consideration has been adopted by English law with regard to the *status* of persons domiciled in a foreign country.

"While the English law remains as it is," writes Mr.

(r) *Udny v. Udny*, L. R. 1 Sc. App. 441, 457, per Lord Westbury; *Sottomayor v. De Barros*, 3 P. D. 1.

(s) The verbal admission of the correctness of this principle has been combined with the practical refusal to adopt it by means of considering features in a legal transaction which, in fact, involve questions of *status* as belonging to the form of the transaction, and, therefore, as depending on the *lex loci contractus*, or, in more general terms, on the *lex actus* or law of the country where the transaction takes place. Thus, the necessity for the consent of parents to the marriage of a minor has been treated as belonging to the formalities of the marriage (*Sottomayor v. De Barros*, 3 P. D. 1).

Those states which, like Italy, wholly disconnect *status* and domicile by making personal condition depend not upon domicile but upon nationality or allegiance (*Codice Civile del Regno d'Italia*, Art. 6), adopt a view which, at bottom, is not very dissimilar from the first view, which we may call that of Savigny, since, though differing from him as to the test by which to determine what is the country to which an individual belongs, they agree with him in holding that a person's *status* under the law of the country to which he belongs ought to be his *status* in every other country.

Westlake, "it must, on principle, be taken as excluding, "in the case of transactions having their seat here, not "only a foreign age of majority, but also all foreign determination of *status* or capacity, whether made by law or "by judicial act, since no difference can be established "between the cases, nor does any exist on the continent" (u).

The question, therefore, whether a person domiciled in France should, in respect of transactions in England, be considered, *e.g.*, an infant or not, would on this view depend wholly on English law, without any reference to the law of France. If he were below twenty-one he would, if he were above twenty-one he would not, be considered an infant. On the same grounds, the liability of a domiciled Englishman of eighteen in respect of a debt incurred in Scotland would, even in our courts, depend on the law not of England but of Scotland (x). Yet, though several instances may be cited in which our courts have refused recognition to a *status* imposed by the law of a person's domicile in respect of transactions not taking place in the country where he was domiciled, they have not at any time adhered consistently to the principle of refusing such recognition, and every year they show less inclination to adopt this principle, or, at any rate, to carry it out (y) to its full extent.

(u) *Westlake*, s. 402. See also *Story*, s. 98, from which it appears that he held that no rule could be established as to the recognition of *status*. Westlake's view of the state of English law, which was a fair inference from the cases in existence when he wrote (1858), would probably now be modified on account of the decisions and *dicta* which have been delivered during the last twenty years. See especially *Sottomayor v. De Barros*, 3 P. D. 1; *Udny v. Udny*, L. R. 1 Sc. App. 441.

(x) *Male v. Roberts*, 3 Esp. N. R. 163. Compare 2 *Fraser, Treatise on Husband and Wife* (2nd ed.) pp. 1317, 1318; *Sforza v. Sandilands*, 5 Jur. 398; 2 S. & McL. 214.

(y) Contrast *e.g. Johnstone v. Beattie*, 10 Cl. & F. 42, 114, with *Stuart v. Bute*, 9 H. L. C. 440; and compare *Birtwhistle v. Vardill*, 2 Cl. & F. 571, with *Skottowe v. Young*, L. R. 11 Eq. 474; see also *Boyes v. Bedale*, 33 L. J. (Ch.) 283; *Goodman v. Goodman*, 3 Giff. 643; *Simonin v. Mallac*, 29 L. J. (P. & M.) 97; 2 Sw. & Tr. 67. A comparison of these cases exhibits a distinct tendency on the part of the courts to approximate in practice to the foreign theory that *status* is regulated wholly by the *lex domicilii*.

(3) The existence, but not necessarily, the effect of status depends on *lex domicilii*.

Third view.—The existence at any rate of a *status* imposed by the law of a person's domicile ought in general to be recognised in other countries, though the courts of such countries may exercise their discretion in giving operation to the results or effects of such *status*.

This is the principle (if so it can be called) which is meant to be stated in the rule under consideration (z), and which, it is conceived, most nearly corresponds with the actual practice of our courts. It constitutes a kind of practical compromise between the first and the second view (a), and enables the courts to recognise the existence of a *status* acquired under the law of a person's domicile, while avoiding the practical difficulties which arise from subjecting legal transactions to rules of law which may be unknown in the country where the transaction takes place.

The operation of the rule may be thus illustrated :

D. is the son of a person domiciled in France, and is legitimate according to the law of France in consequence of the marriage of his parents after his birth. His legitimacy is certainly for some purposes recognised by English

(z) Rule 25, p. 163, *ante*.

(a) This principle comes very near to the opinion of some jurists that a distinction ought to be made between the existence of a *status*, for example, infancy, and the legal results or effects of it, and that while the existence of the *status* ought to be determined wholly by the law of the person's domicile, the extent to which effect should be given in other countries to the results of such *status*, e.g., to the infant's incapacity to contract, depends upon other laws, as, for example, the *lex loci contractus*, or the law of the place where the contract is made. As a speculative view, this opinion is obviously open to criticism, but it represents in a theoretical form the difficulty which the law courts of any country are certain to feel in practice of either referring questions of *status* wholly to the *lex domicilii*, or on the other hand entirely refusing recognition to personal conditions imposed by the law of a person's domicile.

The great practical inconvenience of holding that a man of twenty-four who enters into a contract in England is not bound by it here, because by the law of his Spanish domicile he is a minor, may be taken as one illustration of the difficulty of carrying out to the full that *status* depends upon the law of domicile.

courts (c). On the other hand he is not allowed by English tribunals the whole of the advantages which, had he been born before marriage, would have accrued to him under English law as his father's heir, for he is not allowed to succeed to English real estate (d).

So, again, the fact that a person is appointed guardian of an infant under the infant's *lex domicilii* is certainly recognised as a fact by English judges (e), but it cannot be said that the powers of a foreign guardian are, as such, recognised in England (f).

When, however, the bearing of the rule is understood, General
remarks
rule. two points with regard to it become apparent.

The rule in the first place, though it is all which can be extracted by way of principle from decided cases, is seen to be so vague as to be of comparatively little use for practical purposes. The fact that the existence of a particular *status* under a person's *lex domicilii* is generally recognised does not answer the important question how far the capacities or incapacities of an individual under the law for example of his French domicil, will be allowed by English courts to affect transactions in England. The answer to this enquiry (as far as in the dearth of authorities it can be given at all), must be sought for in the rules deducible from English decisions with regard to the recognition to be given to particular kinds of personal condition or *status* (g).

The rule in the second place applies to two different classes of cases, that is to say, to cases in which English courts have to consider the effect to be given to an English *status* as regards transactions taking place out of England,

(c) *Skottowe v. Young*, L. R. 11 Eq. 474.

(d) Rule 85, p. 181, *post*.

(e) See *Nugent v. Vetzera*, L. R. 2 Eq. 704.

Di Savini v. Lousada, 18 W. R. 425.

(f) *Stuart v. Bute*, 9 H. L. C. 440. See Rules 28—30, pp. 172—176, *post*.

(g) The effect of Rule 24, p. 161, *ante*, must always be borne in mind. It denies any effect as regards transactions in England to whole classes of personal conditions, *e.g.*, slavery.

and to cases in which English courts have to consider the effect to be given to a foreign *status* as regards transactions taking place in England.

When, however, the decisions as to particular kinds of *status* are examined, it will be found that they throw, comparatively speaking, little light on the answer to the question what are the limits within which our courts will recognise the effect of an English *status* on transactions taking place abroad? We may probably, indeed, conclude that their inclination will be to give effect to an English *status* as regards transactions in a foreign country; thus, a married man domiciled in England, is under English law, guilty of bigamy if he marries in a foreign country where he is not domiciled, even after he has obtained a divorce from the courts of that country (*h*); a person domiciled in England is incapable of marrying his deceased wife's sister, and cannot rid himself of such incapacity by marrying in a country where such a marriage is lawful (*i*); and a person who, being domiciled at birth in England, is born out of lawful wedlock is incapable of legitimation under the law of a foreign country (*k*). On the other hand the tendency of our courts seems to be to hold that as regards capacity to contract, and in several other respects also, the effect of an English *status* is even, as regards a domiciled Englishman, overridden by the law of the country where a contract or other legal transaction takes place (*l*).

The decisions throw more light on the answer to the enquiry what are the limits within which our courts will recognise the effect of a foreign *status* on transactions taking place in England, and make it possible to state in several cases rules with regard to the effect of a foreign *status*, which may be considered to be applications of the rule now under consideration.

(*h*) *Lolley's Case*, 2 Cl. & F. 567.

(*i*) *Brook v. Brook*, 9 H. L. C. 193, and Rules 44—45, pp. 200—223 *post*.

(*k*) *Re Wright's Trusts*, 25 L. J. (Ch.) 621, 2 K. & J. 595.

(*l*) See Rules 31, 37, pp. 177, 193, *post*. 2 *Fraser, Treatise on Husband and Wife*, (2nd ed.) pp. 1317, 1318.

CHAPTER III.

PARTICULAR KINDS OF STATUS.

A.—Parent and Child (a).

RULE 26.—The power of a parent, whether Rule 26.
English or foreign, over the person of his child Power of
while in England, is not affected by the law of the parent
parent's foreign domicile over child. (*b*).

By the law of England the parental authority of a foreign Power
father over his child is recognised, but "the authority so over person
"recognised is only that which exists by the law of of child.
"England. If, by the law of the country to which the
"parties belonged, the authority of the father was much
"more extensive and arbitrary than in this country, is it
"supposed that a father would be permitted here to trans-
"gress the power which the law of this country allows?
"If not, then the law of this country regulates the authority
"of a parent of a foreign child living in England by the
"laws of England, and not by the law of the country to
"which the child belongs" (*c*).

(a) See *Story*, s. 468a.

Westlake, s. 405.

Phillimore, ss. 522—531.

Wharton, ss. 252—256 (*a*).

(b) See *Johnstone v. Beattie*, 10 Cl. & F. 42, 114. *Nugent v. Vetzera*,
L. R. 2 Eq. 704.

(c) *Johnstone v. Beattie*, 10 Cl. & F. 42, 114.

D. is a Frenchman domiciled in France, travelling in England with his son of ten years old. D. flogs the child for some fault. Whatever the laws of France, D.'s authority to administer such punishment cannot be questioned in an English court, since D. has not exceeded the limits of authority recognised by English law. If, again, D. in punishing his son exceeds the limits of what is deemed by English law reasonable chastisement when inflicted by an English parent, D. cannot justify his conduct here by showing that the punishment is allowed by French law.

Rule 27. **RULE 27.**—The rights of a parent domiciled in a foreign country, over the moveables in England belonging to an infant are, perhaps, governed by the law of the parent's domicile, but are more probably governed while the infant is in England, by the ordinary rules of English law (e).

Rights of parent over child's moveables.

There is little or no authority (except one case) as to a foreign father's rights in respect of the moveables of an infant. The tendency of English law to follow the maxim, *mobilia sequuntur personam*, rather favours the view that the parent's rights may depend on the *lex domicilii*. But the case itself (f) is not decisive. D. married M. in Holland, where M. was then domiciled. Under the marriage settlement of M., and a subsequent judicial compromise in Holland, their children became on M.'s death entitled to one-fourth of certain property of M.'s in the public funds. By the Code Napoleon, which is the law of Holland, a surviving parent has, while children are under the age of eighteen, the enjoyment of their property. D. and M.

(e) *Gambier v. Gambier*, 7 Sim. Rep. 263.
Phillimore, s. 529.
Wharton, s. 256.

(f) *Gambier v. Gambier*, 7 Sim. Rep. 263.

removed to, and became *domiciled* in England, and had children born to them there. M. died, and the children being under eighteen, the question arose as to D.'s rights in respect of their property in the English funds. It was held that D. had no right to it.

The grounds of the decision were thus explained :

"By the Code Napoleon, which is the law of Holland as well as of France, when children are under the age of eighteen, their surviving parent has the enjoyment of their property until they attain that age. *But that is nothing more than a mere local right, given to the surviving parent by the law of a particular country, so long as the children remain subject to that law; and, as soon as the children are in a country where that law is not in force, their rights must be determined by the law of the country where they happen to be. These children were never subject to the law of Holland; they were both born in this country, and have resided here ever since.* The consequence is, that this judicial decree has adjudged certain property to belong to two British born subjects domiciled in this country; and so long as they are domiciled in this country their personal property must be administered according to the law of this country. *The claim of their father does not arise by virtue of the contract, but solely by the local law of the country where he was residing at the time of his marriage; and, therefore, this property must be considered just as if it had been an English legacy given to the children, and all that the father is entitled to is the usual reference to the Master, to inquire what allowance ought to be made to him for the past and future maintenance of his children*"(g).

All the parties were *domiciled* in England, and, therefore, the case may have been decided on the ground of domicile; but the expressions in the judgment seem to imply that the rights of the children must be determined by the law, not of the domicile, but of the country where

(g) *Gambier v. Gambier*, 7. Sim. 263, 270, *per Shadwell*, V.-C.

they happen to be, which, in this case, was England, although the same country happened to be that of their domicil.

B.—Guardian and Ward.

Rule 28.
Foreign
guardian
no direct
authority
in Eng-
land.

RULE. 28.—A guardian appointed under the law of a foreign country (called hereinafter a foreign guardian) has no direct authority as guardian in England (*h*) ; but the English courts recognise the existence of a foreign guardianship, and will, in their discretion, give effect to a foreign guardian's authority over his ward (*i*).

A foreign guardian has, as such, no rights in England. Guardianship is considered by our courts as an institution existing under the local law of the country where the guardian is appointed, and as being, in fact, part of the administrative law of that country. The rights, therefore, of a guardian are considered not to extend beyond the limits of the country where he receives his appointment. Hence a Scotch guardian appointed in Scotland has (it has been held (*k*)) no authority in England.

"Foreign tutors and curators cannot be English guardians without being able to derive their authority from some one of the sources from which the English law considers that the right of guardianship must proceed ; and it has before been shewn that the rights and duties of a foreign tutor and curator cannot be recognised by the courts of this country with reference to a child residing in this country. The result is, that such foreign tutor and curator can have no right as such in this

(*h*) *Story*, s. 499 ; *Westlake*, s. 402 ; *Phillimore*, ss. 543—553a ; *Johnstone v. Beattie*, 10 Cl. & F. 42.

(*i*) *Nugent v. Vetzera*, L. R. 2 Eq. 704 ; *Stuart v. Bute*, 9 H. L. C. 440 ; *Di Savini v. Lousada*, 18 W. R. 425.

(*k*) *Johnstone v. Beattie*, 10 Cl. & F. 42.

"country, and this so necessarily follows, from reason
 "and from the rules which regulate, in this respect, the
 "practice of the Court of Chancery, that it could not be
 "expected that any authority on the subject would be
 "found" (*l*).

The effect of this language is, it is true, modified by expressions used in a later case (*m*), but it still expresses the principle of English law. Hence, in spite of the existence of foreign guardians, other guardians have on application been appointed by our courts (*n*). Foreign guardians have been prevented from removing their ward out of England (*o*), and foreign guardians who wish to exercise their powers in England must apply to the courts to be appointed English guardians (*p*). Whether or not the courts will give them authority is a matter of discretion, though the fact of the applicants being foreign guardians is of great weight in determining into whose custody the ward shall be committed (*q*). But recognized to certain extent.

For the courts in modern times certainly do recognise the existence (*r*) of the foreign guardianship. Hence where two infants, Austrian subjects, were sent to England for education, the Court of Chancery refused to interfere with the discretion of the guardian, appointed by an Austrian court of competent jurisdiction, when he wished to remove them from England in order to complete their education in Austria; but English guardians having been already appointed the court refused to discharge the order by which they were appointed, and merely reserved to the foreign guardian the exclusive custody of the children to which he was entitled by the order of the foreign court (*s*). The

(*l*) *Johnstone v. Beattie*, 10 Cl. & F. 42, 114, per Lord Cottenham.

(*m*) *Stuart v. Bute*, 9 H. L. C. 440, 470.

(*n*) *Johnstone v. Beattie*, 10 Cl. & F. 42.

Nugent v. Vetzera, L. R. 2 Eq. 704.

(*o*) *Dawson v. Jay*, 3 De G. M. & G. 764.

(*p*) See *Story*, s. 499a.

(*q*) *Ibid.*

(*r*) See Rule 25, p. 163, *ante*.

(*s*) *Nugent v. Vetzera*, L. R. 2 Eq. 704

principles which guided the court were explained as follows:

"I am now asked in effect to set aside the order of the Austrian court, and declare that this gentleman so appointed cannot recall his wards who have been sent to this country for the purpose of their education. It would be fraught with consequences of very serious difficulty, and contrary to all principles of right and justice, if this court were to hold that when a parent or guardian (for a guardian stands exactly in the same position as a parent) in a foreign country avails himself of the opportunity for education afforded by this country, and sends his children over here, he must do it at the risk of never being able to recall them, because this court might be of opinion that an English course of education is better than that adopted in the country to which they belong. I cannot conceive anything more startling than such a notion, which would involve on the other hand this result, that an English ward could not be sent to France for his holidays without the risk of his being kept there and educated in the Roman Catholic religion, with no power to the father or guardian to recall the child. Surely such a state of jurisprudence would put an end to all interchange of friendship between civilised communities. What I have before me is nothing more or less than that case"(t).

"With respect to the English guardians of these children I hold that the court has power to appoint them, and I continue those that have been appointed. The case may well happen of foreign children in this country without any one to look after or care for them, or who may require the protection of this court to save them from being robbed and despoiled by those who ought to protect them. These children, on the other hand, seem to have met with nothing but kindness from their relations on all sides, but it may be desirable that, so long as they remain in this country, they should have the protection of guardians

(t) *Nugent v. Vetzera*, L. R. 2. Eq. 704, 712, per Wood, V.-C.

“living within the jurisdiction. Out of respect to the
 “authority of the Austrian courts, by which this gentle-
 “man has been appointed, I reserve to him, in the order I
 “am about to make, all such power and control as might
 “have been exercised over these children in their own
 “country if they were there, and had not been sent to
 “England for a temporary purpose. Taking that view of
 “the case I have not asked to see the children. I could
 “not be influenced by anything I might hear from them.
 “I assume that they are most anxious to remain here, and
 “not to go back to their own country, but I have no right
 “to deprive the guardian appointed by the foreign court
 “over them of the control which he has lawfully and
 “properly acquired, has never relinquished and never
 “abandoned, and under which authority alone they have
 “remained here, and been maintained and supported
 “here” (u).

Where an Italian court had appointed guardians for an Italian infant, who came to England and, being made a ward in Chancery was with the consent of the Italian guardians placed in the custody of English guardians, who did not carry out the directions of the Italian guardians, the Court of Chancery, upon the application of the Italian court, appointed new guardians, and declared its readiness to carry out in all respects the orders of the Italian court with regard to the infant, so far as might be consistent with the laws of England (x). The position, therefore, now taken up by the English courts appears to be this: A foreign guardian has (like a foreign administrator) no direct legal power in England (y), but may be appointed guardian by the English courts much as a foreign administrator may take out letters of administration in England.

The subject is one on which it is difficult to lay down precise rules, both because in all matters of guardianship the courts act mainly on their discretion, and with reference to

(u) *Nugent v. Vetsera*, L. R. 2 Eq. 704, 712, 714, per Wood, V.-C.

(x) *Di Savini v. Lousada*, 18 W. R. 425.

(y) See Rule 25, p. 163, ante.

the particular circumstances of each case, and because the later decisions involve a recognition of foreign guardianship not in reality consistent with the doctrine of the earlier cases that the powers of guardians are strictly local.

The authority of a guardian who is not appointed by the courts of the foreign infant's domicile (*e.g.*, of a guardian appointed by a French court for an Italian infant) will, it is conceived, not be recognised in England.

Rule 29.

Power
of foreign
guardian
in Eng-
land over
person of
ward.

RULE 29.—A foreign guardian has, unless interfered with by the courts, control over the person of his ward whilst in England (z).

D., an Italian guardian, brings his ward, also an Italian, to England. D. takes his ward out of England. D. acts legally and does not expose himself to any legal proceedings for removing his ward.

Rule 30.

Foreign
guardian
no power
over ward's
moveables
in Eng-
land.

RULE 30.—A foreign guardian cannot interfere with moveables situated in England belonging to his ward (a).

D., a French guardian of a French minor, sells to M. goods belonging to such infant situated in England. D. cannot give a good title to the goods, and by selling them may possibly expose himself to an action for conversion.

(z) *Nugent v. Vetzera*, L. R. 2 Eq. 704. A foreign guardian cannot exercise in England any powers over his ward which could not be exercised by an English guardian. See language of Lord Cottenham in *Johnstone v. Beattie*, 10 Cl. & F. 42, 113, 114; contrast language of Wood, V.-C., L. R. 2 Eq. 714.

(a) *Story*, s. 504a. See American cases cited by *Story*, s. 504a, note 4, and observations of Wood, V.-C., in *Scott v. Bentley*, 1 K. & J. 281, 284.

C. Infancy.

RULE 31.—An infant's capacity to bind himself by a contract depends upon the law of the country where the contract is made (b) (?).

Rule 31.

Infant's
capacity
to con-
tract.

The liability of an infant on contracts made by him in foreign countries probably depends (c) not on the law of his domicile, but on the law of the country where the contract is made.

Infant's
liability on
contracts
depends on
lex loci
contractus

D., a youth of nineteen, domiciled in England, incurred debts in Scotland (d). D. was sued for the debts in England. It did not appear whether by the law of Scotland an infant would or would not have been liable for such debts. As the law of Scotland was not proved one way or the other, the plaintiff failed, but it was distinctly laid down that the validity of the contract must depend on the law of Scotland.

"It appears," said Lord Eldon . . . "that the cause of action arose in Scotland, the contract must

(b) *Male v. Roberts*, 3 Esp. 163.

Dalrymple v. Dalrymple, 2 Hagg. Const. 54.

Scrimshire v. Scrimshire, *Ibid.*, 395.

Simonin v. Mallac, 2 Sw. & Tr. 67.

Story, ss. 82, 332.

Phillimore, s. 384.

Westlake, s. 401.

The direct authority for this rule is slight, being little else than *Male v. Roberts*. This case, however, has never been disputed, appears to be confirmed by the cases on the validity of marriages by infants (such as *Dalrymple v. Dalrymple*), and is on the whole in keeping with the tendency of English law to refer all questions of contract to the *lex loci*. See 2 *Fraser, Husband and Wife*, 1317, 1318, for the view of Scotch courts on the analogous case of a married woman's capacity to contract, and *In goods of Duchess d'Orleans*, 1 S. & W. 253.

(c) i.e., according to English law, to which it must be borne in mind the Rules in this work always have reference.

(d) *Male v. Roberts*, 3 Esp. 163.

"be, therefore, governed by the laws of that country where
 "the contract arises. Would infancy be a good defence by
 "the law of Scotland had the action commenced there ?

"What the law of Scotland is with respect to the right
 "of recovering against an infant for necessities, I cannot
 "say, but if the law of Scotland is that such a contract as
 "the present could not be enforced against an infant, that
 "should have been given in evidence; and I hold myself
 "not warranted in saying that such a contract is void by
 "the law of Scotland, because it is void by the law of
 "England. The law of the country where the contract
 "arose must govern the contract, and what that law is
 "should be given in evidence to me as a fact. No such
 "evidence has been given, and I cannot take the fact of
 "what that law is without evidence" (e).

D., a man of twenty-two, is domiciled in a country
 where majority is fixed at twenty-five. He cannot, it
 would seem, on the ground of infancy, escape liability in
 England for a debt contracted in England (f).

The following statement of the law by Mr. Westlake
 well deserves notice :—

"The validity of a contract made out of England, with
 "regard to the personal capacity of the contractor, will be
 "referred in our courts to the *lex loci contractus*; that is,
 "not to its particular provisions on the capacity of its
 "domiciled subjects, but in this sense, that, if good where
 "made, the contract will be held good here, and conversely.
 "Hence, if an Englishman of twenty-three should contract
 "in Prussia, where the age of majority is twenty-five, his
 "contract will be good here, because the Prussian courts
 "would apply our law on a question of status" (g).

This remark should be noticed as explaining what is
 meant in our rule by the expression law of the place where
 the contract is made (*lex loci contractus*), which otherwise

(e) *Male v. Roberts*, 3 Esp. 163, 164, per Lord Eldon.

(f) This, if *Male v. Roberts*, 3 Esp. 163, is good law, is, I think, an in-
 evitable inference from that case.

(g) *Westlake*, s. 404.

may be misunderstood. The rule, however, itself can, even when rightly understood, be only laid down as "probably" correct. For the courts have quite recently, as regards marriage (i), acted upon the principle that "*as in other contracts*, so in that of marriage, personal capacity must depend "on the law of domicile" (k), and it is not at all certain that this principle will not be applied to all contracts made by persons under incapacities such as infancy. With the one exception of *Male v. Roberts* (l), there is not a single case decisive on the point (m).

But questionable how far this principle carried.

It may also well be doubted whether even supposing the rule under consideration to be well grounded, it can be applied to cases where an infant domiciled in England has entered into a contract abroad either without any consideration or for which he has not received any consideration.

RULE 32.—The capacity of any person for the alienation of moveables depends (so far as the question of infancy or majority is concerned) on the law of that person's domicile.

Rule 32.
Infant's capacity for alienation.

The general rule is that the capacity for the alienation of moveables depends on the law of a person's domicile (n).

Capacity to alienate in general dependent on *lex domicilii*.

Hence the capacity of an infant domiciled in England to make a valid gift (o) or sale of goods must in general be regulated by the law of England, even though the goods were at the moment of the transaction situated in France;

(i) See Rules 44, 45, pp. 200, 217, *post*.

(k) *Sottomayor v. De Barros*, 3 P. D. 1, 5.

(l) 3 Esp. 168.

(m) Such cases as *Simonin v. Mallac*, 2 Sw. & Tr. 67, 29 L. J. (P. & M.) 97. *Scrimshire v. Scrimshire*, 2 Hagg. Const. 395, *Dalrymple v. Dalrymple*, *Ibid.* 54, are explainable on another ground, viz., that they only show that the necessity for a parent's consent to a marriage is to be considered as affecting only the formal requisites for a marriage.

(n) See p. 248, *post*.

(o) See as to the invalidity of a gift by an infant, *Mucpherson on Infants*, p. 458, *Coke Litt.*, p. 171b.

But this principle modified by effect of *lex loci contractus* and of *lex situs*.

and the capacity of an infant domiciled in France to make a valid gift or sale of goods situated in England must, it would seem, depend on the law of France. The statement, however, that an infant's capacity depends on the law of the country where he is domiciled, must be taken with considerable reservations. In the first place, alienation in general takes place in consequence of a contract, and it is by no means certain that the validity of a contract made by an infant and the ensuing alienation will not be judged of by our courts according to the law of the place where the contract is made (p), thus, if D., an infant domiciled in England, makes in France a contract with A. to sell A. goods lying in England, and conveys such goods to A., it is possible that his capacity to effect a valid sale will be judged of by the law of France. In the second place, it is on the whole probable that in accordance with Rule 55 (q) a title to goods which is valid under the law of the place where the goods are actually situated will be held valid here, even though the person by whom they were given or sold was under an incapacity for alienation by the law of his domicile; thus, if D., an infant domiciled in England, makes in France a gift of goods in his house at Paris to A., under circumstances which give A. a good title according to French law, A.'s title will probably be held good in England, even though D. is incapable of making a valid gift by English law.

Rule 33.

Infant's testamentary capacity.

RULE 33.—An infant's testamentary capacity in respect of moveables depends on the law of the infant's domicile.

This rule is a mere application of the general principle that the validity of a will of moveables depends on the law of the testator's domicile (s), and is not affected by 24 & 25 Vict. c. 114, ss. 1 and 2 (t).

(p) *Male v. Roberts*, 3 Esp. 163, and see p. 177, *ante*.

(q) See p. 255, *post*, and also Rule 57, p. 262, *post*.

(s) See Rules 67—68, pp. 293—297, *post*.

(t) See *Parent and Child*, Rules 26—27, pp. 169—172, *ante*; *Guardian and Ward*, Rules 28—30, pp. 172—176, *ante*.

D. Legitimacy (u).

RULE 34.—A child born anywhere in lawful wedlock (*x*) is legitimate. Rule 34.

Child born
in wedlock
legitimate.

If any dispute arises as to the legitimacy of a child ostensibly born in lawful wedlock, it will be found that the matter in dispute is not the validity of this rule, but either the validity of the marriage (*y*), or the proof of the fact that the child was born in wedlock.

The latter point in no way concerns the law of domicil.

RULE 35.—The law of the father's domicil at the time of the birth of a child born out of lawful wedlock determines whether the child becomes, or may become, legitimate in consequence of the subsequent marriage of the parents (*legitimatio per subsequens matrimonium*) (*z*). Rule 35.

Child
born out
of wedlock
when
legiti-
mated.

Case i.—If the law of the father's domicil at the time of the birth of the child allows of *legitimatio per subsequens matrimonium*, the child becomes, or may become, legitimate on the marriage of the parents (*a*).

(*u*) See as to legitimacy, *Story*, ss. 87*a*, 93—93*v*, 105—106.

Westlake, ss. 90—94, 406, 407.

Phillimore, ss. 532—542.

Wharton, ss. 240—250*a*.

Savigny, s. 380, pp. 250—265.

Bar, ss. 101, 102.

1 *Felix*, p. 82, note (*d*).

(*x*) By marriage or wedlock in these rules is meant what is known as marriage among Christian nations. Reference is not, unless the contrary is expressly stated, intended to be made to polygamous marriages. See Rule 44, p. 290, *Hyde v. Hyde*, L. R. 1 P. & D. 130, and pp. 213, 214, *post*.

(*y*) See as to validity of marriage, Rules 44, 45, pp. 200, 217, *post*.

(*z*) *Udny v. Udny*, L. R. 1 Sc. App. 441. *Re Wright's Trusts*, 25 L. J. (Ch.) 621, 2 K. & J. 595.

(*a*) *Ibid*.

Case ii.—If the law of the father's domicile at the time of the birth of the child does not allow of *legitimitio per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents (b).

Person
born out
of wed-
lock
cannot
be heir to
English
real estate.

But a person born out of lawful wedlock cannot be heir to English real estate, nor can any one, except his issue, inherit English real estate from him (c).

(i.) General
principle
as to legiti-
mation.

According to the law of England, of the Northern States of America, and of all countries governed by the English common law, a child born before the marriage of his parents cannot be legitimated by the subsequent marriage of the parents. According to the law of Scotland, of France, and of most countries which have adopted or have been influenced by the Roman law, such a child is or may be legitimated by the subsequent marriage of the parents. These countries, in short, allow what is technically known as *legitimitio per subsequens matrimonium* (d).

This fundamental difference of law has given rise to

(b) *Re Wright's Trusts*, 25 L. J. (Ch.) 621, 2 K. & J. 595; *Shedden v. Patrick*, 1 Macq. 535; *Munro v. Saunders*, 6 Bligh. 468; *Dalhousie v. McDouall*, 7 Cl. & F. 817; *Munro v. Munro*, *Ibid.* 842.

(c) *Birtwhistle v. Vardill*, 2 Cl. & F. 571, *In re Don's Estate*, 4 Drew, 194, 27 L. J. (Ch.) 98.

The principle of this proviso applies when the child is the offspring of the marriage between a man and his deceased wife's sister. Such a marriage when celebrated in a country such as Denmark by Danish subjects there domiciled is probably valid, even in England (see pp. 218—220, *post*), but the child of such a marriage cannot inherit English or Scotch real estate, since it has been held that in order "to inherit land it is not enough to be the issue of married parents, but it is also necessary to be the issue of parents who would have been married if they had gone through the ceremony of marriage in the country where the land lies" (*Fenton v. Livingstone*, 3 Macq. 497, and opinion of J. Westlake, *Parliamentary Paper*, No. 145, 3rd April, 1876).

(d) "The laws of most of the states on the continent of Europe admit this legitimation generally, though with distinctions in respect of certain

various questions as to the extra-territorial effect produced on the legitimacy of a child by the marriage of his parents after his birth. Whether, for example, a child born in Scotland is to be considered legitimate in England on the subsequent marriage of his parents in Scotland or England, whether a child born in England of parents domiciled in Scotland becomes legitimate on the marriage of his parents in England or in Scotland, whether regard is to be had to the place of birth or to the place of marriage, and other inquiries of the same kind, have (in consequence of the difference between English and Scotch law) constantly come before the English courts, or before the House of Lords sitting as a court of appeal from Scotland (e).

After some fluctuation in the decisions the principle stated in the Rule has been well established. The test whether the subsequent marriage of a child's parents can legitimate him is the law of the father's domicile at the time of the child's birth.

The principle that the law of the country where a child's father is domiciled at the time of the child's birth is the (ii.) Cases to which principle applies.

"illegitimate children, or in respect of the form of the acknowledgment by the parents (comp., e.g., *Febrero, Noviss. tom. i, tit. 3, c. 2, p. 118*, *D'Aguesscau, Œuvres, vii.*, 381, 470). It is also the law in the Isle of Man (*Lex Scripta of the Isle of Man*, pp. 70, 75), Guernsey and Jersey, in Lower Canada, St. Lucia, Trinidad, Demerara, Berbice, at the Cape of Good Hope, Ceylon, Mauritius, as well as, in North America, in the States of Vermont, Maryland, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky, Missouri, Indiana, and Ohio (*Burge, i. 101*), also in Scotland (*Ersk. Inst. i. 6, 52*; *Bankton, i. 5, 54*). In Ireland, England, (Co. Litt. 245 (a) note), and those of its dependencies in the West Indies and North America which have not been named, as well as in the other States of North America (*Griffith's Law Register, passim*), legitimation by subsequent marriage is not admitted at all." (*Savigny (Guthrie's Note)*, a. 37, pp. 255, 256.)

(e) Most of the decisions on this subject are given by the House of Lords as a Scotch court of appeal; but it is conceived that the principles laid down, e.g., in *Udny v. Udny* may be taken as generally binding, and would be adhered to by the House of Lords when sitting as an English court.

test of the child's capacity for being legitimated by the subsequent marriage of his parents applies to two cases.

Case 1.
Law of
domicil
allows
legitima-
tion.

If the law of the country—for example, Scotland or France—where the father is domiciled (not necessarily where he is resident (*f*)) at the time of a child's birth recognise *legitimatio per subsequens matrimonium*, the child, though born before the marriage of his parents, may become (*g*) legitimate on their subsequent marriage. Thus, where D.'s father was domiciled, though not residing, in Scotland at the time of the child's birth in England, it was held that the subsequent marriage of his parents made the child legitimate (*h*). The child "being the child of a "domiciled Scotchman had, at the moment of [his] birth, "a capacity for being legitimated by the subsequent "marriage of [his] parents" (*i*).

Case 2.
Law of
domicil
does not
allow
legitima-
tion.

If, on the other hand, the law of the country (for example, England or New York) where the father is domiciled do not allow of *legitimatio per subsequens matrimonium*, no subsequent marriage will avail to make the child legitimate.

Thus, where D., an Englishman, domiciled in England, had, while residing in France, a child by a Frenchwoman, herself domiciled in France, it was held that the subsequent marriage of the parents did not legitimate the child (*k*). This was a particularly strong case, because the father had, after the birth of the child but before the marriage, acquired a French domicil.

Capacity
for legiti-
mation not
affected by

Several circumstances which might be held of importance have now been determined not to affect capacity for legitimation.

(*f*) For the distinction between domicil and residence, see pp. 42, 43, *ante*, and *Gillis v. Gillis*, Irish L. R. 8 Eq. 597.

(*g*) It is not certain that he will do so, since the law of the country may, for the purpose of legitimation, require something more than the fact of marriage, as, for example, some ceremony or formality to be gone through by the father.

(*h*) *Munro v. Munro*, 7 Cl. & F. 842.

(*i*) *Ibid.*, p. 881, *per Lord Cottenham*.

(*k*) *Re Wright's Trusts*, 25 L. J. (Ch.) 621, 2 K. & J. 595.

The domicile of the mother is immaterial.

(1) Domicil
of mother.

Thus, where D.'s mother was at the time of his birth a domiciled Frenchwoman, it was distinctly laid down that "no importance can be attributed to the fact of the mother being a Frenchwoman. A domiciled Englishman having a child before marriage in any part of the world by a woman of any other nation, the legitimacy or illegitimacy of that child must be determined by the law of his domicile" (l). So, on the other hand, if the father is a domiciled Scotchman, the child's capacity for being legitimated is not affected by the mother being a domiciled Englishwoman (m).

The place of the child's birth is unimportant.

(2) Place
of child's
birth.

It was, indeed, at one time thought that the law of the country *where the child was born* (not of the father's domicile at the time of the birth) determined the effect of the subsequent marriage on the legitimacy of the child (n). It is, however, now settled that the place of the birth is immaterial, and that what is material is the domicile of the father, and, further, that the question in every case "must be, can the legitimisation of a child be effected in the country in which the father is domiciled at his birth? for the child's legitimacy must be decided by the law of that country once for all" (o).

(l) *Re Wright's Trusts*, 2 K. & J. 595, 610, *per Page Wood*, V.C.

(m) *Munro v. Munro*, 7 Cl. & F. 842. That the domicile of the mother should have no effect is rather remarkable. From the fact that an illegitimate child derives his domicile of origin from his mother (see Rule 6, clause 2, pp. 69, 72, *ante*), it might be inferred that his capacity for legitimation would depend on the law of her domicile.

(n) Compare *Story*, ss. 93*iv*, 93*a*. *Re Wright's Trusts*, 2 K. & J. 595, 610.

(o) *Re Wright's Trusts*, 2 K. & J. 595, 614. Judgment of *Page Wood*, V.C.; *Munro v. Munro*, 7 Cl. & F. 842; *Udny v. Udny*, L. R. 1 Sc. App. 441. "How can such a question be affected by the law of any other country [than that of the father's domicile] in which the child may happen to be born? The importance of *De Conty's case* and *Munro v. Munro* (7 Cl. & F. 842) is that they decide a doubt which seems to have been floating in the minds of several judges of eminence as to whether the place of birth did not affect the domicile of the child." *Re Wright's Trusts*, 2 K. & J. 595, 610, *per Page Wood*, V.C.

(8) Place
of mar-
riage.

The *effect* of the marriage in no degree depends on the place where the marriage is celebrated.

A marriage performed in England according to the ritual of the English Church will legitimatise the children of a father domiciled in Scotland at the time of their birth before his marriage with their mother (*p*).

Illustra-
tions of
principle.

The operation of the principle contained in the rule under the different circumstances to which it may be applied may be seen from the following illustrations, in each of which D. is the father, M. the mother, and C. the child. It is assumed in each case that their marriage takes place after C's birth. To understand these examples the reader must bear in mind that Scotch law allows, whilst English law does not allow, *legitimatio per subsequens matrimonium*.

1. D. and M. are domiciled in Scotland at the time of C's birth. C. is born in Scotland. D. and M. marry in Scotland whilst domiciled there.

C. is legitimate.

2. D. is domiciled in Scotland, but M. the mother, is domiciled in England at the time of C's birth. The birth and the marriage take place in Scotland, D. being domiciled in Scotland and M. continuing domiciled in England, at the time of the marriage.

C. is legitimate.

3. D. is domiciled in Scotland, but has resided for a long time, and is residing in England at the time both of C's birth and of the marriage. M. is an Englishwoman domiciled in England. The marriage takes place according to the ceremonies of the Church of England.

C. is legitimate (*q*).

4. D. is domiciled in Scotland at the time of C's birth, but has long resided in England. M. is an English-

(*p*) *Munro v. Munro*, 7 Cl. & F. 842.

(*q*) *Udny v. Udny*, L. R. 1 Sc. App. 441; *Munro v. Munro*, 7 Cl. & F. 842; *Dalhousie v. McDouall*, 7 Cl. & F. 817. Compare *Shedden v. Patrick*, 1 Macq. 535, 611.

woman domiciled in England. C. is born in England. After C.'s birth, but before the marriage with M., D. acquires an English domicil. D. marries M. whilst domiciled in England.

C. is probably legitimate (*t*).

5. D. and M. are domiciled in England at the time of C.'s birth. C.'s birth takes place in England. D. and M. marry in England whilst domiciled there.

C. is illegitimate.

6. D. is domiciled in England, but M. is domiciled in Scotland at the time of C.'s birth. The birth and the marriage both take place in England, D. being domiciled in England and M. continuing domiciled in Scotland at the time of the marriage.

C. is illegitimate.

7. D. is domiciled in England, but has resided for a long time, and is residing, in Scotland at the time both of C.'s birth and of the marriage. M. is an English-woman domiciled in England. The marriage takes place in Scotland according to the forms of the Church of Scotland.

C. is illegitimate.

8. D. is domiciled in England, but is residing in Scotland at the time of C.'s birth. M. is a Scotchwoman domiciled in Scotland, C. is born in Scotland. After C.'s birth, but before the marriage with M., D. acquires a Scotch domicil. D. marries M. according to the forms of the Church of Scotland whilst domiciled in Scotland.

C. is illegitimate (*x*).

The proviso that no one born out of lawful wedlock can inherit English lands, is a strict application of the principle (iii.) Proviso as to inherit.

(*t*) This is only an inference from *Re Wright's Trusts*, 25 L. J. (Ch.) 621; 2 K. & J. 595.

(*x*) This is (substituting Scotland for France) the state of facts decided upon in *Re Wright's Trusts*, 25 L. J. (Ch.) 621.

ance of
English
lands.

that rights to immoveables are governed by the *lex situs*, that is, by the ordinary law of the country where the land is situated (*y*).

The rule of English law is, that real property must go to the "heir," and a man must, in order to be an heir according to English law, fulfil two conditions:— First, he must be the eldest living, legitimate son of his father. This condition is fulfilled by a Scotchman who, born of a father domiciled in Scotland, is legitimated by the subsequent marriage of his parents. Secondly, he must be born in lawful wedlock. This condition cannot be fulfilled by a person who is legitimated after his birth. Such a person, therefore, though legitimate, cannot be an English heir, and, therefore, cannot inherit English land.

On similar grounds he cannot transmit the right to land to his father (*z*), or to collateral relations, since, in order to do this, he must in substance establish the very connection between him and his father, which would make him, under different circumstances, heir to his father.

That the want of being born in lawful wedlock, and not illegitimacy on the claimant's part, is the true ground for the decision in *Birtwhistle v. Vardill* (*a*), is seen from the answer given by the judges to a question submitted to them by the House of Lords. The inquiry made by their Lordships was in substance whether B., who was born before the marriage of his parents, who were domiciled in Scotland, could, in virtue of their subsequent marriage and his legitimation according to Scotch law, be heir to real property in England. Part of the answer was as follows:—

"It appears to us that the answer to the question which
"your lordships have put must be founded on this distinc-

(*y*) For the meaning of *lex situs*, see pp. 85, 86, *ante*, and also p. 36, note (*m*), *ante*.

(*z*) *Re Don's Estate*, 4 Drew. 194, 27 L. J. (Ch.) 98.

(*a*) 2 Cl. & F. 571.

"tion (b): while we assume that B. is the eldest legitimate son of his father, in England as well as in Scotland, we think that we have also to consider whether that status, that character, entitles him to the land in dispute as the heir of that father; and we think that this question, inasmuch as it regards real property situated in England, must be decided according to those rules which govern the descent of real property in that country, without the least regard to the rules which govern the descent of real property in Scotland. We have, therefore, considered whether, by the law of England, a man is the heir of English land merely because he is the eldest legitimate son of his father. We are of opinion that these circumstances are not sufficient of themselves, but that we must look further, and ascertain whether he was born within the state of lawful matrimony; because by the law of England that circumstance is essential to heirship, and that is a rule not of a personal nature, but of that class which, if I (c) may use the expression, is sown in the land, springs out of it, and cannot, according to the law of England, be abrogated or destroyed by any foreign rule or law whatsoever. It is this circumstance which, in my judgment, dictates the answer we must give to your lordship's question, namely, that in selecting the heir for English inheritance we must inquire only who is that heir by the local law" (d).

Two points require notice:—

First. A person legitimate under Rule 35 in one country is, according to the law of England, legitimate everywhere (e). What the proviso lays down is in effect that a person, in order to be an English "heir," must be something more than legitimate. It does not (as it is often supposed to do) lay down that a man may be legitimate, *e.g.*, in

Limitations to proviso.

(b) *i.e.*, the distinction between "real and personal status" (statutes?)

(c) The opinion of the judges was delivered by *Alexander*, C.B.

(d) *Birtwhistle v. Vardill*, 2 CL & F. 571, 573, 577.

(e) *Re Don's Estate*, 27 L. J. (Ch.) 98, 4 Drew. 194. See especially judgment of *Kindersley*, V.C., 27 L. J. (Ch.) 100.

Scotland, but illegitimate in England. Thus in a case with regard to legacy duty, the question arose what duty was payable by the daughters of D., a British subject, domiciled in France, the daughters having been legitimated by the marriage of their parents after their birth. It was held that they were not strangers in blood to their father, and ought to pay only the £1 per cent. duty due from children, and the law was thus stated:—

“If . . . the daughters of the testator are legitimate by the law of France, and must, therefore, in this country, be considered as having the status of children, it is difficult to see how, in any sense, they can be ‘strangers in blood.’ Where the *Legacy Duty Act* uses these words, it is as a description of the status of the person.

“In *Birtwhistle v. Vardill* (f) it was admitted that the claimant had in England the *status* of the eldest legitimate son of his father; but inasmuch as he claimed to be heir, and as such entitled to inherit land in England, his status of eldest son was not enough, and he was held bound to prove that he was ‘heir’ according to the law of the country in which the land was situated. As he was unable to prove that he was the eldest son of his father born in wedlock, he failed to show that he filled the character of heir, though he did establish his status of eldest legitimate son.

“It is said that the words ‘stranger in blood’ include the status known to English law as applied to English persons; but this will be that of a domiciled Frenchman, and his status and that of his children must be their status according to the law of France, which, according to *Birtwhistle v. Vardill*, constitutes their English status.

“If in *Birtwhistle v. Vardill* the claimant’s status was that of eldest legitimate son of his father, it would be absurd to say that he was a stranger in blood.

“The status of these ladies being that of daughters legitimated according to the law of France by a declara-

"tion of the father, it is impossible to hold that they are for any purpose strangers in blood, on the mere ground that, if they had been English and their father domiciled in England, they would have been illegitimate" (g).

Secondly. The rule is, it will be observed, strictly confined to "real estate," which descends to the heir. It has clearly no application to moveables (h). A question arises how far the principle of it applies to "chattels real," e.g., leases for years which pass not to the "heir" but to the "executor." For many purposes chattels real are treated by writers and by the courts as subject to the same rules as other immoveable property (k), and the principle which lies at the bottom of Rule 35, viz., that the succession to landed property is so closely connected with the political institutions of a state that every nation naturally claims to regulate such succession by its own local rules (l), applies as much to leaseholds as to freehold interests in land. On the other hand, the language of the judges and the technical grounds for their decision in *Birtwhistle v. Vardill*, seem to imply that the succession to personal estate is not regulated by the law of the country where the land is situated.

D., a Scotchman, domiciled in Scotland, has, whilst unmarried, a child, C., by M. D. afterwards marries M., and after M.'s death dies intestate, possessed of

Illustration of application of Rule to succession to property.

- (a) a freehold estate in England;
- (b) money and furniture situated in England;
- (c) a house in London held on a lease of ninety-nine years.

C., the child, *does not* inherit the freehold estate since he is not D.'s "heir" according to the law of England (m).

(g) *Skottowe v. Young*, L. R. 11 Eq. 474, 477, per Stuart, V.C.

(h) As to succession to moveables, see Rules 66—71, pp. 291—312, *post*.

(k) See, e.g., *Freke v. Lord Carbery*, L. R. 16 Eq. 461. In *Goods Gentili*, Ir. L. R. 9 Eq. 541.

(l) Compare the judgment of *Littledale, J.*, in *Birtwhistle v. Vardill*, 5 B & C., pp. 438, 454, 455.

(m) Rule 35, p. 181, *ante*.

C. takes the money, furniture, &c., or the share thereof to which he may be entitled by the law of Scotland (n).

C. possibly may take the house in London as part of D.'s personal estate (o).

Questions suggested by Rule.

The whole Rule, including the proviso, leaves open several questions which cannot be answered with absolute certainty.

Question 1.
Effect of change of domicile after birth of child.

1st Question. What is the effect of a change of domicile after the birth of a child and before the marriage of the parents?

Such a change of domicile from, e.g., England to Scotland, clearly does not affect the illegitimacy of the child. After as before the marriage the child remains illegitimate (p).

The effect of a change of domicile from Scotland to England is more doubtful. Probably it does not affect the legitimacy of the child. But this is not certain. It is possible that the effect of the marriage must in this case be taken to depend on the *lex domicilii* at the time of the marriage, i.e., the law of England.

Question 2.
Effect of legitimation by a foreign law (i)

2nd Question. What is the effect, according to English law, of a person being made legitimate by the authority of a foreign sovereign? (r).

Suppose that a person born illegitimate is legitimated by a decree of the Czar of Russia, will such a person be held legitimate here?

There is no English authority on the subject. The most probable answer is (it is conceived) that the effect of such a decree would, like the effect of a subsequent marriage of the parents, depend on the domicile of such person's father at the time of his birth. Suppose, that is to say, that D., the child's father, were domiciled in Russia at the time of the child's birth, the decree would have the effect

(n) Rule 66, p. 291, *post*.

(o) This, however, is very doubtful. See *Freke v. Lord Carbery*, L. R. 16 Eq. 461, and especially *In Goods Gentili*, Ir. L. R. 9 Eq. 541, and compare *Du Houxmelin v. Sheldon*, 4 My. & C. 525. *Rules as to Immovables*, A 1 p. Note IV.

(p) *Re Wright's Trusts*, 25 L. J. (Ch.) 621.

(r) See *Bar*, s. 102; *Phillimore*, s. 542.

of making the child legitimate in England. A person, on the other hand, born of a father domiciled in England, could not be made legitimate here by the force of any foreign law.

E.—Husband and Wife.

RULE 36.—The power of a husband, whether English or foreign, over the person of his wife while in England, is not affected by the law of his foreign domicile (s). Rule 36.
Power of husband over wife.

The question what amount of control a husband may exercise over the freedom of his wife, and what amount of force (if any) he may use in controlling her, must be answered with reference to the law of the place where they are residing.

Our courts certainly would not allow a foreigner when in England, whatever might be his domicile, to exercise over his wife any power which might not be lawfully exercised by an Englishman. It seems, also, that a foreigner, resident with his wife in England, may, though not domiciled here, apply to our courts for restitution of conjugal rights (t).

RULE 37.—A married woman's capacity to contract depends on the law of the country where the contract is made (?) (u). Rule 37.
Married woman's capacity to contract.

(s) See *Wharton*, s. 120; *Polydore v. Prince* (Am.), Ware, 402; *Phillimore*, s. 486; 1 *Bishop, Marriage and Divorce*, s. 407. As to husband's rights in respect of wife's property, see Rules 60—62, pp. 268—276, *post*.

(t) See *Connelly v. Connelly*, 7 Moore P. C. 438.

(u) See *Westlake*, s. 404. This appears to be the view of the Scotch courts. See 2 *Fraser, Husband and Wife*, p. 1818.

This Rule is, however, at least as doubtful, as the analogous Rule 31 (*w*) as to infants.

There is the authority of one case for the assertion that a married woman, capable of entering into contracts by the law of a foreign country where she carries on business, can sue here for debts which had there become due to her (*x*). But in the particular case, the foreign country—Spain—where the business was carried on, was apparently the domicile of the married woman, and the case, even had it actually decided the point raised in it (which it did not), would have been nothing more than an application of the principle contained in Rule 23 (*y*), that a person's *status* in the country of his domicile is recognised here as respects transactions completed in that country.

Cases may easily be imagined, the solution of which is, to say the least, very doubtful.

D., a married woman domiciled in England, enters, while in a foreign country, into a contract, on which she is liable, according to the law of that country, but on which she would not be liable if she had entered into it here. Perhaps her liability can be enforced here by an action, but whether this be so or not is uncertain (*z*).

D., a married woman, domiciled in Massachusetts, is resident in England. She incurs debts here for which she would be liable by the law of Massachusetts if they had been incurred there, but for which, if incurred in England, a married Englishwoman would not be liable. D. is sued in an English court. It would seem again to be extremely doubtful whether or not the action could be maintained against her (*a*).

(*w*) See p. 177, *ante*.

(*x*) *Cosio v. De Bernales*, 1 C. & P. 266.

(*y*) p. 159, *ante*.

(*z*) See, however, *Bank of Louisiana v. Williams*, 12 Am. Rep. 317, which appears to decide that in such a case D. would not be liable.

(*a*) The mode in which D. must be sued, including the question whether her husband must be joined as a defendant, must be regulated by the ordinary English rules of procedure. See pp. 150, 153, *ante*.

RULE 38.—A married woman's capacity for the alienation of moveables depends in general upon the law of her domicile. **Rule 38.**
Married woman's capacity for alienation.

The remarks made with reference to the capacity of an infant for alienation of moveables apply to a considerable extent to that of a married woman. In either case the capacity in general depends on the law of the person's domicile at the time of alienation, but any incapacity which exists may, in practice, be modified by the effect given to the *lex loci contractus* (a), and to the *lex situs* under Rule 57 (b).

RULE 39.—A married woman's testamentary capacity as to moveables depends on the law of her domicile (c). **Rule 39.**
Married woman's testamentary capacity.
Lunatic.

F.—Lunatic and Curator, or Committee (d).

RULE 40.—A foreign decree or commission appointing a person curator or committee of a **Rule 40.**
Foreign curator no

(a) See remarks on foregoing Rule, 37, p. 193, *ante*.

(b) See p. 262, *post*. It should, however, be remarked that (as regards English law at any rate) the incapacity of an infant is different in kind from the incapacity (if so it can be called) of a married woman. An infant cannot make a valid alienation, *e.g.*, by gift of goods of which he is the undoubted owner. A married woman cannot, at common law, alienate goods because they do not belong to her but to her husband. This is clearly not an incapacity to alienate, but an incapacity to own goods. A married woman's capacity, therefore, to alienate must, in so far as it depends on capacity for ownership, be determined with reference to the law regulating the rights of husband and wife over moveables. See Rules 60—61, pp. 268—276, *post*.

(c) See for comment, p. 180, *ante*, as to *infant's* testamentary capacity. See also as to validity of wills, Rules 68, 69, pp. 294, 298, *post*.

(d) See *Phillimore*, ss. 563, 504.

In re Houston, 1 Russ. 312.

Re Elias, 3 Mac. & G. 234.

Newton v. Manning, 1 Mac. & G. 362.

Scott v. Bentley, 1 Kay & J. 281.

Re Garnier, L. R. 13 Eq. 532.

Mackie v. Darling, L. R. 12 Eq. 319.

Re Dyson, 29 L. J. (Q. B.) 68.

In re Stark, 2 Mac. & G. 174.

power to
deal with
lunatic's
property in
England.

lunatic resident in a foreign country does not of itself empower the curator or committee to deal with the person or property of the lunatic in England (e).

D. was a lunatic, resident in Jamaica, where a commission of lunacy was issued against him. D. was brought over by one of his committees to England. A relative in England petitioned for a new commission. It was contended that the Jamaica commission was in force, and sufficient. It was held, however, that a new commission was needed.

"The commission now existing in Jamaica" it was laid down "is no reason why a commission should not issue here. On the contrary, it is evidence of the absolute necessity that there should be somebody authorised to deal with the person and estate of this lunatic. While the lunatic is here, no court will have any authority over him or his property unless a commission is taken out" (f).

Question.

Can a foreign curator sue here for money due to the lunatic? D., residing in Scotland, there became of unsound mind, and A. was appointed D.'s *curator bonis* according to Scotch law. It was held that A. could sue in this country for money due to D., and give a good discharge for it (g).

The principle of this decision is thus explained in the judgment:

"In *Newton v. Manning* (h) Lord Cottenham is reported to have said, that if a person invest himself abroad with full right to receive the property of a person found lunatic

(e) *In re Houston*, 1 Russ. 312.

(f) *Ibid.*, per Eldon, Ch.

(g) See *Scott v. Bentley*, 1 K. & J. 281, 24 L. J. (Ch.) 244; and *Morison's Case*, a Scotch case referred to in *Sill v. Worwick*, 1 Hy. Bl. 677.

(h) 1 Mac. & G. 362.

“there, when he applies to the jurisdiction of this country, he may obtain the lunatic's property.

“As a party abroad can assign his rights I do not see why a court of competent jurisdiction should not transfer them when he becomes a lunatic” (i).

This decision may appear inconsistent with the general principle that a foreign curator has not as such authority in this country. His right to sue, and his want of authority as curator may, perhaps, be reconciled in the following manner: The *status* of a foreign curator is not recognised as giving him, from the mere fact of his being curator, control over a lunatic, or his property, in England (k). But the curator having, by his appointment in a foreign country, become, under the foreign law, the owner for certain purposes of the lunatic's property, may enforce his rights with respect to it in an English court, just as he might if he had purchased the property, or were an assignee in bankruptcy. The right is one, in fact, acquired by a transaction taking place wholly under the law of a foreign country, and, as such, enforceable here (l).

It must, however, be admitted that the right of the foreign curator to sue for debts due to the lunatic is not thoroughly well established, and, perhaps, not at bottom consistent with the theory that he has no authority in England. On the other hand, it must always be kept in mind that our courts have in recent times shewn a disposition to deviate from this theory, and to recognise the authority of curators or guardians appointed under the law of a foreign country.

RULE 41.—If a curator or committee duly appointed under a foreign decree applies to the court for the payment to him of money belong-

Rule 41.
Discretion
of court as
to pay-
ment of

(i) *Scott v. Bentley*, 1 K. & J. 281, 284, *per Page Wood*, V.C.

(k) See Rule 25, p. 163, *ante*.

(l) See Rule 23, p. 159, *ante*; *Vanquelin v. Bouard*, 15 C. B. n. s. 341

lunatic's
money to
foreign
curator.

ing to the lunatic, the court may in its discretion grant or refuse the application (*m*).

D., an Englishman resident in France, was decreed a lunatic there, and A. was appointed curator. A fund in this country, to which the lunatic was entitled, was paid into court under the Trustees Relief Act. A. applied to have the fund paid to him. The court, in their discretion, retained the capital, and paid only the dividends to A. (*n*).

G.—Corporations (*o*).

Rule 42.
Existence
of foreign
corpora-
tion
recognised.

RULE 42.—The existence of a foreign corporation duly created under the law of a foreign country is recognised by our courts (*p*).

The principle is now well established that a corporation duly created in one country is recognised as a corporation by other states. Thus it is a matter of daily experience that foreign corporations sue and are sued in their corporate capacity before English tribunals.

Rule 43.
Capacity
of corpora-
tion.

RULE 43.—The capacity of a corporation to enter into legal transactions depends both on the constitution of the corporation, and on the law of the country where the transactions occur (*q*).

(*m*) *In re Garnier*, L. R. 13 Eq. 532; *Re Stark*, 2 Mac. & G. 174; *Grimwood v. Bartels*, 46 L. J. (Ch.) 788, which, though it only decides that a foreign curator cannot claim the English real estate of the lunatic, rather implies that he might claim the moveables (situated in England) belonging to the lunatic. See Rule 25, p. 163, *ante*.

(*n*) *In re Garnier*, L. R. 13 Eq. 532.

(*o*) See on the subject of foreign corporations, 2 *Lindley* (3rd ed.), p. 1486.

(*p*) This is clearly an application of Rule 25, p. 163, *ante*.

(*q*) See 2 *Lindley*, 3rd ed., p. 1486; *Branley v. S. E. Ry. Co.*, 12 C. B. n. s. 63.

The power or capacity of a corporation is limited in a two-fold manner. Twofold limitation to capacity.

First.—Its capacity is limited by its constitution. A corporation, for example, which is prohibited by its constitution from the purchase of land, has no power to effect a valid purchase of land in any country, for the corporation exists as such only by virtue of its constitution, and any acts done in contravention of its constitution by its directors or others are *ultra vires*, and in strictness not the acts of the corporation. (1) From constitution.

Secondly.—Its capacity is limited by the law of the country where a given transaction takes place. It cannot do any act forbidden by the law of such country. (2) From *lex loci contractus*.

Thus a foreign corporation authorised by its constitution to acquire and hold land, cannot hold land in England in contravention of the Mortmain Acts.

Similarly an English corporation empowered by its terms of association to purchase land, work mines, &c., in a foreign country, cannot obtain land in a colony or other foreign country if the holding of land by a corporation is prohibited by the laws of such foreign country.

CHAPTER IV.

MARRIAGE (a).

Rule 44. **RULE 44.**—Subject to the exceptions hereinafter mentioned, a marriage is valid when

Validity of marriage.

- (1) each of the parties has, according to the law of his or her respective domicil, the capacity (b) to marry the other; and
- (2) any one of the following conditions as to the form (c) of celebration is complied with (that is to say):
 - (i) if the marriage is celebrated in accordance with any form recognised as valid by the law of the country where the marriage is celebrated (d)

(a) *Savigny*, s. 379, p. 240; s. 381, p. 265, 270.

Story, ss. 79—90, 107—124b.

Phillimore, ss. 390—439.

Westlake, ss. 333—348.

2 *Felix*, pp. 365--508.

(b) *Sottomayor v. De Barros*, 3 P. D. 1.

Mrs. Bulkeley's Case in the French courts, cited in note to *Pitt v. Pitt*, 4 Macq. 649.

Brook v. Brook, 9 H. L. C. 193.

(c) *Simonin v. Mallac*, 2 Sw. & Tr. 67, 29 L. J. (P. & M.) 97.

Dalrymple v. Dalrymple, 2 Hagg. Const. 54.

Scrimshire v. Scrimshire, 2 Hagg. Const. 395.

Herbert v. Herbert, *ibid.*, 263.

Smith v. Maxwell, Ryan & Moody 80.

Swift v. Kelly, 3 Knapp. 257.

(d) *Ibid.*

(called hereinafter the local form);
or

- (ii) if the parties enjoy the privilege of ex-territoriality, and the marriage is celebrated in accordance with any form recognised as valid by the law of the State to which they belong(e); or
- (iii) if the marriage (being between British subjects?) is celebrated in accordance with the requirements of the English Common Law in a country where the use of the local form is impossible (f); or
- (iv) if the marriage is celebrated in a country not being part of the British dominions, in accordance with the provisions of, and the forms required by, 4 Geo. 4, c. 91, 12 & 13 Vict. c. 68, or any other Statute applicable to the case.

In this Rule and the following Rules the term "marriage" means the voluntary union for life of one man and one woman to the exclusion of all others (g).

(e) *Pertreis v. Tondear*, 1 Hagg. Const. 136.

Lautour v. Teesdale, 8 Taunt. 830.

Rex v. Brampton, 10 East 282.

See also *Marriage Commission Rep.*, p. L.

(f) *Ruding v. Smith*, 2 Hagg. Const. 371.

Westlake, s. 344.

Cruise on Dignities, 276.

Marriage Comm. Rep., p. L.

Waldegrave Peerage Case, 4 Cl. & F. 649.

Lloyd v. Petitjean, 2 Curt. 251.

Este v. Smyth, 18 Beav. 112, 23 L. J. (Ch.) 705.

(g) For this definition of the term marriage, see *Hyde v. Hyde*, L. R. 1 P. & D. 130.

The validity of a marriage depends on two conditions: first, on the *capacity* of the parties to marry each other; secondly, on the celebration of the marriage in due *form*.

(1) Capacity.

The capacity of each of the parties to a marriage is to be judged of by their respective *lex domicilii*. If they are each, whether belonging to the same country (*i*) or to different countries, capable according to their *lex domicilii* of marriage with the other, they have the capacity required by the rule under consideration. In short, "as in other contracts, so in that of marriage, personal capacity must "depend on the law of domicil" (*k*).

D., for example, marries M., his deceased wife's sister, in Massachusetts, where they are both domiciled. They are both American citizens, and under no incapacity, according to the law of their domicil, though they would, if domiciled in England, not be capable of marriage with each other. Their marriage is valid in England (*l*).

D. and M. are Portuguese subjects, but domiciled in England. Being first cousins, they are by the law of Portugal incapable of contracting a valid marriage with each other. They are duly married in London, according to the forms required by English law. Their marriage is valid (*m*).

(2) Form.
(1) Local form.

A marriage celebrated in the mode or according to the rites or ceremonies held requisite by the law of the country where the marriage takes place, is (as far as formal requisites go) valid. Our courts in this matter give effect to the principle that the form of a contract is governed by the law of the place where the contract takes place, and hold that

(i) For meaning of country, see pp. 31—33, *ante*.

(k) *Sottomayor v. De Barros*, 3 P. D. 1, 5, *per Curiam*.

(l) p. 220, note (*b*), *post*.

(m) This is an inference from *Sottomayor v. De Barros*, 3 P. D. 1.

though under certain circumstances other forms may be sufficient (n), yet that the local form always suffices, and that in general "the law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted" (o).

In two respects, an extremely wide extension has been given to the principle contained in the words just cited.

In the first place, the consents of parents or others necessary by many laws to the validity of a marriage, are considered as part of the ceremony or form of the marriage (p).

(n) See clauses (ii), (iii), (iv) of Rule 44, pp. 200, 201, *ante*, and pp. 205—212, *post*.

(o) *Sottomayor v. De Barros*, 3 P. D. 1, 5, *per Curiam*; *Simonin v. Mallac*, 2 Sw. & Tr. 67, 29 L. J. (P. & M.) 97.

(p) *Sottomayor v. De Barros*, 3 P. D. 1, 7, *per Curiam*. This doctrine is now fully established by decided cases, but logically it is open to criticism. A person who cannot marry without the consent of another is, *pro tanto*, under an incapacity, and on the principle that capacity depends on the *lex domicilii*, the want of such consent ought to invalidate a marriage wherever it takes place.

The earlier English decisions did not distinguish between *capacity* and *form*, and brought both one and the other within the principle of the *lex loci contractus*. It was therefore laid down that the validity of a marriage, celebrated in Scotland, was to "be adjudicated according to the principles of English law applicable to such a case; but the only principle applicable to such a case by the law of England, is, that the validity of [a person's] marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland" (*Dalrymple v. Dalrymple*, 2 Hagg. Const. 54, 59, *per Sir Wm. Scott*). Hence the validity, both of so called Gretna Green marriages, and of marriages in foreign countries, though purposely celebrated out of England to evade the requirements as to consents of the English marriage law, became firmly established by a series of cases, the effect of which could not be reversed except by legislation.

At a later period, the courts distinguished between capacity for marriage and the forms of marriage, holding that questions of capacity depended in part at least on the *lex domicilii* (*Brook v. Brook*, 9 H. L. C. 193). The decisions with respect to Scotch marriages could not then be reversed, and in order to reconcile them with the new distinction, between capacity and form, the courts were driven to adopt the logically very doubtful theory, that the question of consent belongs to the marriage ceremony.

In the second place, the validity of a marriage is in no degree affected by the fact that the object of the parties in marrying away from their own country, is to evade the requirements of the law of their domicile as to consents, publicity, &c., or that no regular ceremony is required by the law of the country where the marriage takes place (g).

Hence, on the one hand, marriages between domiciled English persons, celebrated in a foreign country, are valid, if solemnised according to the forms required by the law of the country, *e.g.*, Scotland or France, where the marriage takes place (*r*); and on the other hand, the marriage in England of foreigners, *e.g.*, French subjects domiciled in France, is, if duly celebrated according to the forms of English law, held valid here, even though it may be pronounced invalid by a French court for want of the consents required by French law, or because the parties meant to evade the operation of French law.

D., an English infant domiciled in England, wishes to marry M., an Englishwoman. To evade the opposition of his guardians, D. goes to Scotland, and resides there for three weeks (*s*). M. then joins D. in Scotland, and they are privately married there *per verba de præsenti*, *i.e.*, by the mere statement in the presence of witnesses, that they are man and wife. The marriage is valid (*t*).

D. and M., British subjects domiciled in England, and both of them infants, are privately married at Madrid by a Roman Catholic priest. The marriage, if valid by Spanish law, is valid here (*u*).

(g) *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54.

Scrimshire v. Scrimshire, *ibid.*, 395.

Swift v. Kelly, 3 Knapp. 257.

Simonin v. Mallac, 2 Sw. & Tr. 67, 29 L. J. (P. & M.) 97.

See remarks of Lord Brougham in *Warrender v. Warrender*, 2 Cl. & F. 488, 548.

(r) *Ibid.*

(s) Residence of one of the parties in Scotland for twenty-one days is now required under 19 & 20 Vict. c. 93, s. 1.

(t) *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54.

(u) *Swift v. Kelly*, 3 Knapp. 257.

D. and M. are French subjects domiciled in France. D. cannot obtain his father's consent to the marriage. To avoid the necessity for such consent D. and M. come to England, and are there married by licence in accordance with English law. The marriage is invalid in France, for want of the due consents, but is held valid by our courts (x).

With reference to a case, of which the above were in substance the circumstances, the Court of Appeal thus expressed itself:

"The objection to the validity of the marriage in that case, which was solemnised in England, was the want of the consent of parents required by the law of France, but not under the circumstances by that of this country. In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage" (y).

The subjects of a state are, under certain circumstances, when in fact not residing within the limits of such state, considered by a fiction of law to be resident there and to be subject to its laws. This fiction is termed *ex-territoriality* (z). (ii) Where parties enjoy ex-territoriality.

The effect of ex-territoriality as regards marriages (u) is

(x) *Simonin v. Mallac*, 2 Sw. & Tr. 67, 29 L. J. (P. & M). 97.

(y) *Sottomayor v. De Barros*, 3 P. D. 1, 7, per Curiam.

The form need not necessarily be the form required by the *lex loci* in ordinary cases. All that is essential in order to bring a marriage within clause (i) is that it should be contracted in a form which, according to the law of the country where the marriage takes place, is sufficient under the circumstances of the particular case to constitute a valid marriage. Suppose, for example, that the law of France were that marriages between British subjects might be validly contracted in France if celebrated in accordance with the rites of the Church of England without any further ceremony. Then a marriage at Paris between D. and M., British subjects, celebrated according to the rites of the Church of England, would be valid here as being celebrated according to the form required by the *lex loci contractus*.

(z) See *Woolsey*, *International Law* (3rd. ed.), s. 64.

(u) *Pertre v. Tondear*, 1 Hagg. Const. 136; *Lautour v. Teesdale*, 8 Taunt. 830; *Re v. Brampton*, 10 East 282; *Mar. Comm. Rep.*, p. L.

The application of ex-territoriality to the validity of a marriage is simply an extension of the rule, that a marriage is valid which is celebrated

that where it applies a marriage is valid though not celebrated according to the ordinary local forms of the place of celebration, and is treated as though it had been in fact celebrated in the country in which it is supposed by a fiction of law to have been solemnised.

The principle of ex-territoriality applies to marriages celebrated in the mansion of an ambassador, to marriages celebrated at foreign factories and certain places, mainly found in the East, in which Europeans enjoy the privileges of ex-territoriality, and lastly to marriages celebrated on board ship (b).

Marriages
at ambas-
sador's.

The mansion of an ambassador is treated as part of the country which he represents. Hence marriages there, by subjects of that country, are good if celebrated according to forms held valid by its laws.

D. and M., British subjects, are married, according to the rites of the Church of England, at the British Embassy at Paris. Their marriage is, independently of Acts of Parliament (c), valid in England, and would, it may be added, be held valid elsewhere. D. and M., Spanish subjects, are married according to Spanish forms, at the Spanish Embassy in London. Their marriage is valid in England and elsewhere.

This privilege of ex-territoriality probably extends only to cases where *both parties* are subjects of the ambassador's Sovereign. It certainly does not extend to cases where neither of the parties are his subjects.

The marriage between D., a foreigner, in the suite of the Spanish ambassador, and M., who was not a Bavarian subject, was celebrated at the chapel of the Bavarian

according to a form held sufficient by the law of the country where the marriage is celebrated. Marriages, for example, celebrated in the house of an ambassador are, if within the principle of ex-territoriality, valid, according to the law of the country where they are celebrated, though not celebrated according to the form ordinarily required.

(b) The application of the principle in the last case is somewhat different from its application in the first two cases.

(c) See Rule 44, clause (iv), p. 201, *ante*.

ambassador in London. It was held invalid on the following grounds :

" The party who proceeds was in the suite of the Spanish ambassador, and not of the Bavarian : and the other party, though she has the name of a foreigner, is not described as being of any ambassador's family, and has been resident in this country four months, which is much more than is necessary to constitute a matrimonial domicile in England, inasmuch as one month is sufficient for that under the Act of Parliament. Supposing the case, therefore, to be assimilated to that of a marriage abroad between persons of a different country, it is difficult to bring this marriage within the exception, as this woman is not described as domiciled in the family of an ambassador. Taking the privilege to exist (which has, perhaps, not been formally decided), I may still deem it a fit subject of consideration, whether such a privilege can protect a marriage where neither party, as far as appears at present, is of the country of the ambassador, and where one of them has acquired a matrimonial domicile in this country, and where it is not shown that she had been living in a house entitled to privilege during her residence in England. On these grounds I shall admit the libel. The matter may receive further illustration of facts which may entitle it to further consideration " (d).

It may be assumed, though the point cannot be treated as judicially decided, that the privilege of ex-territoriality does not in England extend to any British subject (e).

It was at one time common in all lands, and is still common in the East, for the government of the country to allow to foreigners, at any rate within the limits of factories or trade settlements, the use of their own laws. In this case, the factory is regarded as part of the country to which it belongs, and persons marrying there may make a valid marriage by celebrating it according to the law of that country.

(d) *Pertreis v. Tondear*, 1 Hagg. Const. 136, 138, 139, *per Curiam*.

(e) *Mar. Comm. Rep.*, p. xxxviii.

Marriage
at foreign
factories.

"In foreign countries, where either by express treaty or by the comity of nations the privilege of ex-territoriality has been enjoyed by British subjects within any defined limits, such as the factory of a trading company, or the hotel of an ambassador, the marriage of a British subject, solemnised within such limits, according to the law of England, as it existed antecedent to the passing (*f*) of Lord Hardwicke's Act, has always been upheld by English courts as a valid marriage" (*g*). The rule applied to the marriages of English subjects no doubt also applies to those of foreigners. D. and M., for example, French subjects, marry at a French factory in Turkey, according to French forms. Their marriage will be held valid by English courts.

Marriages
on ship
board.

Any ship on the high seas, and a ship of war, even when in a foreign port, is deemed part of the country to which the ship belongs. Marriages, therefore, on ship board are in general valid, if good by the law of such country.

Difficulty
in apply-
ing
principle
of ex-terri-
toriality to
marriage of
British
subjects.

The application of the principle of ex-territoriality to the marriages of British subjects presents some difficulty, from the fact that British subjects are citizens of a state (*h*) which consists of different countries. Hence the inquiry may be raised, what is the law by which a British subject, for instance on board a British man-of-war, is governed, and by which the validity of his marriage on ship board is to be determined? Is it the Common Law of England or the Statute Law and Common Law combined, or the law of the country, *e.g.*, Scotland, where he is domiciled?

The answer to these and other questions of a like sort appears to be that in the cases to which the principle of ex-territoriality applies, a British subject must be taken to be under the rule of the Common Law of England (*i*).

(*f*) *i.e.*, marriage before an episcopally ordained clergyman, *e.g.*, a clergyman of the Church of England, a Roman Catholic priest, or a priest of the Greek Church : *Reg. v. Millie*, 10 Cl. & F. 534.

(*g*) *Marr. Comm. Rep.*, p. L.

(*h*) For the distinction between a "state" and a "country," or law district, see pp. 31—33, *ante*.

(*i*) The correctness of this view, though open to question, appears to me

D. and M., British subjects, marry on board a British man-of-war. The marriage service is performed by a Roman Catholic priest. The marriage being good at common law is valid (*k*).

D. and M., Scotch persons, domiciled in Scotland, contract marriage on board a British man-of-war, *per verba de presenti*. No minister is present at the time of the making of the contract. The marriage is probably invalid (*l*).

Sub-clause (iii) applies to marriages in countries where (iii) Where use of the local form is impossible. it is strictly impossible for the parties to use a local form.

The impossibility may arise from the country being one where no local form of marriage, recognised by civilised states, exists, as where the marriage takes place in a land inhabited by savages, or it may arise from the form being one which it is morally or legally impossible for the parties to use. On this ground, a marriage between Protestants, celebrated at Rome by a Protestant clergyman, was admitted to be valid by Lord Eldon, on its being sworn that two Protestants could not there be married in accordance with the *lex loci*, as no Roman Catholic priest would be allowed to marry them (*m*). On the same ground, marriages in

confirmed by the principle, that British subjects settling in a newly discovered country, carry the law of England with them : 1 *Blackstone*, p. 108; *Westlake*, s. 152; by the rules as to Anglo-Indian domicil (pp. 140—148, *ante*); and by the language of 28 & 29 Vict. c. 63, s. 3; 4 Geo. 4, c. 91; 12 & 13 Vict. c. 68, s. 20.

(*k*) *Reg. v. Millis*, 10 Cl. & F. 534.

(*l*) The questions which may be raised as to the law which governs British subjects when on board a British man-of-war may, of course, also be raised as to the law which governs them when they are within the limits of a British Embassy, or of a country where British subjects can claim the privilege of ex-territoriality; but marriages of British subjects in foreign countries are now to such a great extent regulated by 4 Geo. 4, c. 91, and 12 & 13 Vict. c. 68, that questions as to the validity of such marriages, independently of these Acts, are unlikely to arise.

The same difficulties which exist in applying the principle of ex-territoriality to the marriages of British subjects, may exist in applying it to the marriages of persons belonging to other states, such as the Austro-Hungarian empire, consisting of different countries, with possibly different marriage laws.

(*m*) *Cruise on Dignities*, p. 276; *Westlake*, s. 244.

The Roman law was, as *Westlake* points out, incorrectly stated.

heathen or Mahomedan (*n*) countries would be held valid, even though not in accordance with the local form. The validity, again, of marriages celebrated abroad, in accordance with the English Common Law, within the lines of a British army, may possibly (independently of statutory enactments) be placed on the ground of the impossibility of complying with the local form.

That sub-clause (iii) may apply, there must be an impossibility amounting to an insuperable difficulty (*o*) in complying with the local form. "Where persons [are] married abroad it is necessary to show that they were married according to the *lex loci*, or that they could not avail themselves of the *lex loci*, or that there was no *lex loci*" (*p*). Mere difficulty in fulfilling the conditions imposed by the local law is not enough. Thus, the fact that the law of a country does not allow persons to intermarry who have not resided there for six months does not enable British subjects who have resided there for a shorter period to make a valid marriage without complying with the requirements of the local law (*q*).

The cases as to marriages held valid on account of the impossibility of complying with the local form are not numerous, and refer to the marriages of British subjects. It may, however, be assumed that when compliance with the local form is impossible, our courts will hold the marriages of foreigners valid if held good by the law of the country where the foreigners are domiciled. If, for example, D. and M., Italian subjects, domiciled in Italy, intermarry in China in accordance with a form held under the circumstances valid by the Italian tribunals, our courts will probably hold the marriage good (*r*).

(*n*) Supposing, of course, that the local marriage form involved ceremonies in which Christians could not take part. Such marriages would, in fact, almost always come within sub-clause (ii), and be covered by the principle of ex-territoriality. See pp. 205—209, *ante*.

(*o*) *Kent v. Burgess*, 11 Sim. 361, 376.

(*p*) *Per Eldon, C.*; *Cruise on Dignities*, p. 276.

(*q*) *Kent v. Burgess*, 11 Sim. 361.

(*r*) See 1 *Fraser, Husband and Wife*, pp. 1313, 1314.

Sub-clause (iii) applies from its nature only to marriages taking place beyond the limits of the British dominions (s).

The statutes 4 Geo. 4, c. 91, and 12 & 13 Vict. c. 68, provide modes in which (independently of the *lex loci*) a British subject may contract a valid marriage in a country not forming part of the British dominions. Marriages valid under Act of Parliament are for all purposes good in England. The result is, that where one of the parties is a British subject, the following marriages celebrated abroad, though not according to the *lex loci*, are valid, viz. :—

(iv.) Marriage in accordance with 4 Geo. 4, &c.

(1.) A marriage solemnized by a *minister of the Church of England*, in the chapel or house of any British ambassador, or minister residing within the country to the court of which he is accredited (t).

(2.) A marriage solemnized by a *minister of the Church of England*, in the chapel belonging to any British factory, or in the house of any British subject, residing at such factory (t).

(3.) A marriage solemnized within the British lines (t) by a *chaplain or officer*, or *person officiating under the orders of the commanding officer* of a British army serving abroad (u).

(4.) A marriage solemnized *by, or in presence of, a British consul*, in accordance with the provisions of 12 & 13 Vict. c. 68.

Two observations may be made as to marriages within sub-clause (iv) (v).

First.—The validity of marriages within it is inde-

(s) Could a marriage be valid within the terms of sub-clause (iii) if it came within the provisions of 12 & 13 Vict. c. 68? See, however, 12 & 13 Vict. c. 68, s. 21.

(t) 4 Geo. 4, c. 91, s. 1.

(u) *Waldegrave Peerage Case*, 4 Cl. & F. 649.

4 Geo. 4, c. 91, seems to apply to the marriages of aliens no less than of British subjects. If this be so, a marriage within cases (1), (2), and (3) is valid in England, even though both the parties are aliens. 12 & 13 Vict. c. 68 applies only where one of the parties at least is a British subject. Hence a marriage within case (4) is not valid if both the parties are aliens.

(v) Rule 44, p. 200, *ante*.

pendent of the *lex loci*. A marriage by a British subject in France, with a domiciled Frenchwoman, if made in accordance with either 4 Geo. 4, c. 91, or 12 & 13 Vict. c. 68, is valid in England, whether or not it be held valid by French law (*x*).

Secondly.—It is not certain that the English courts would hold the marriage of a foreigner in England valid, simply because it was valid by a law of the foreigner's country, similar to 12 & 13 Vict. c. 68. Suppose, for example, that D., an American citizen, married M., an English subject, before the American consul in London in accordance with the provisions of an Act of Congress. It is extremely doubtful whether English courts would treat such a marriage as valid (*y*).

The operation of this clause may be seen from the following illustration :

D., a Frenchman, domiciled in France, marries M., a British subject, domiciled in France. They are married according to the forms of the Church of England, in the chapel of the English Embassy at Paris, but without observing any of the formalities required by French law. The marriage is valid (*z*).

The marriage would, however, be held invalid by French (*a*) courts (*b*).

(*x*) *Re Wright's Trusts*, 2 K. & J. 595, 25 L. J. (Ch.) 621.

Lloyd v. Petitjean, 2 Curt. 251.

(*y*) See *Schibsy v. Westenholz*, L. R. 6 Q. B. 155, 159, for an example of the principle that the English courts will not always give effect to foreign laws with regard to England analogous to English laws with regard to foreign countries.

(*z*) 4 Geo. 4, c. 91.

Lloyd v. Petitjean, 2 Curt. 251.

(*a*) See *Este v. Smyth*, 18 Beav. 112, 23 L. J. (Ch.) 705.

(*b*) Marriages at St. Petersburg, where one or both of the parties are British subjects, are, if celebrated by the chaplain of the Russia Company, valid under 4 Geo. 4, c. 67. There may possibly be found in the Statute book other special enactments applying to marriages celebrated in particular localities abroad.

A marriage, in whatever manner celebrated, which is or is subsequently rendered valid by an Act of Parliament, will of course be held valid for all purposes by an English court.

By the term "marriage" is meant in these Rules marriage as understood in Christendom, *i.e.*, "the voluntary union for life of one man and one woman to the exclusion of all others" (c). Hence Rule 44 has no application to connections which, though called marriages, either are not intended to be for life, or are made with a view to polygamy. To what extent the law of England will recognise rights, *e.g.*, of inheritance, depending upon the institution of polygamy is doubtful (d); but it is clear that the rule in question does not apply to polygamous marriages (e). It has been laid down that "it would be extraordinary if a marriage in its essence polygamous should be treated as a good marriage in this country. Different incidents of minor importance attach to the contract of marriage in different countries in Christendom, but in all countries in Christendom the parties to that contract agree to cohabit with each other alone. It is inconsistent with marriage, as understood in Christendom, that the husband should have more than one wife" (f). And on the principle that the law of this country is "adapted to the Christian marriage, and . . . is wholly inapplicable to polygamy" (g), the Divorce Court has refused even to dissolve a marriage made in Utah, according to Mormon rites, with the intention to contract a Mormon marriage (g).

The court, nevertheless, did not "profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third

(c) See *Hyde v. Hyde*, L. R. 1 P. & D. 130, 133, *per Lord Penzance*.

(d) *Ibid.*, p. 138.

(e) This is in reality only one instance of the principle that the rules of (so called) private international law apply only amongst Christian States. These rules assume a certain similarity among the laws and institutions existing in the States where they are to be applied.

(f) *Hyde v. Hyde*, L. R. 1 P. & D. 130, 132, *per Lord Penzance*.

(g) *Hyde v. Hyde*, L. R. 1 P. & D. 130, 135; see *Warrender v. Warrender*, 2 Cl. & F. 488, 531, for language of Lord Brougham; *Ardaseer Cursetjee v. Pirozeboyee*, 10 Moore. P. C. 375, 418.

"persons which people living under the sanction of such unions may have created for themselves." All that was "decided is that as between each other, they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England" (*h*).

Incestuous marriage. *Exception 1.*—A marriage is not valid which is incestuous by the laws of all Christian countries (*i*).

A marriage held to be incestuous by the whole Christian world, *e.g.*, a marriage between a brother and a sister, is wherever celebrated invalid by the law of England.

Such a marriage is invalid here, wherever it be celebrated and whoever may be the parties to it, not, in strictness, because it is prohibited by some supposed common law of Christendom, but because it is prohibited by English law on the ground of its being incestuous, whence the inference may be drawn that our courts are forbidden in all cases to recognise such a marriage, without any reference to the place of celebration, or to the allegiance, or to the domicile of the parties (*j*).

Marriage in contra-vention of Royal Marriage Act. *Exception 2.*—A marriage is not valid if either of the parties being a descendant of George II., marries in contravention of the Royal Marriage Act, 12 Geo. 3, c. 11.

(*h*) *Hyde v. Hyde*, L. R. 1 P. & D. 130, 138, *per* Lord Penzance.

(*i*) See *Story*, ss. 113a, 114.

(*j*) In other words, the motive or ground for prohibiting a marriage may be a guide in deciding what are the marriages and who are the persons intended by the legislature to be affected by the prohibition. Thus, if an Act of Parliament were to prohibit the marriage of first cousins, the courts would probably hold that the ground of such a prohibition was not the immorality but the inexpediency of such a marriage, and would therefore draw the inference that the Act had no application to foreigners domiciled out of England. On the other hand, the suggestion has been made that the marriage between an uncle and a niece is prohibited as immoral, and therefore would, under no circumstances whatever, be recognised by our courts (*Warrender v. Warrender*, 2 Cl. & F. 488, 531). The doubts again which may exist as to the limits within which English law refuses recognition to the marriage with a deceased wife's sister, depend at bottom on the different views which may be entertained as to the real ground or motive for the prohibition of such a marriage. See p. 220, note (*b*), *post*.

The Royal Marriage Act enacts in substance that subject to certain exceptions and limitations, no descendant of George II. shall be capable of contracting matrimony without the previous consent of the Sovereign signified in the manner provided by the Act, and that any marriage of such descendant without such consent first had and obtained shall be null and void to all intents and purposes whatsoever.

D., a descendant of George II., married M., at Rome, in accordance with the form required by the *lex loci* without having obtained the consent required by the Act. He was, however, under no disability, either by English or by Roman law, except that which might arise from the contravention of the Royal Marriage Act. His marriage was held by our courts to be absolutely void (*k*).

The Act, and the case decided under it, give rise to two remarks.

First.—Though D. was in fact domiciled in England and a British subject, his marriage would, in all probability, have been held invalid, had he been domiciled at Rome, and probably even had he been an alien. The Act appears intended to apply to all the descendants (with a limited exception (*l*)) of George II., and if this be the intention of the legislature, all courts throughout the British dominions must, of course, give effect to it whatever be the domicile or the allegiance of the persons affected by the Act.

Secondly.—It is probable that foreign courts would not give effect to the provisions of the Royal Marriage Act in the case of persons not domiciled in England, and that our courts, on the other hand, would refuse to give effect to a similar law passed, *e.g.*, by the Italian Parliament, in the case of a person not domiciled in Italy. The incapacity, in short, produced by such a law would be

(*k*) *Sussex Peerage Case*, 11 CL. & F. 85.

(*l*) *Viz.*, the issue of Princesses marrying into foreign families. It is from this exception that the inference may be drawn that the Act applies to descendants of George II., who may not be British subjects.

regarded as constituting a privative *status*, which was not entitled to recognition by the courts of any state except the state where the law was in force (*m*).

Incapacity
of party
according
to law of
country
where
marriage
celebrated.

Exception 3.—A marriage is not valid if either of the parties is, according to the law of the country where the marriage is celebrated, under an incapacity to marry the other (?)

D. and M., his deceased wife's sister, are Prussian subjects domiciled in Prussia, where they are legally capable of marrying each other. While travelling in England they are married at an English church in accordance with the formalities required by English law. The marriage is probably not valid.

"The *status* of marriage," writes Mr. Westlake, "is created on the contract of the parties immediately, and therefore by the *lex loci contractus*, which then alone has power over them. . . . Hence the form is justly referable to the *lex loci contractus*, and so the English cases have decided; while, if the marriage be void by that law, whether for form or any other reason, there is an end of the question" (*n*).

In spite however, of this weighty authority in support of the doctrine that such a marriage is invalid the admission must be made that its invalidity is not free from doubt. Recent decisions (*p*) certainly suggest the conclusion that capacity for marriage is governed by the *lex domicilii* and not by the *lex loci contractus*, whilst American authorities apparently support the view that such a marriage would be regarded as valid in the United States, even though solemnised in England (*q*).

Exception 3, even if maintainable, has no application if the parties to the marriage can claim the benefit of ex-terri-

(*m*) See Rule 24, p. 161, *ante*.

(*n*) *Westlake*, a. 344.

(*p*) *Sottomayor v. De Barros*, 3 P. D. 1, 5; *Brook v. Brook*, 9 H. L. C. 193.

(*q*) *Wharton*, a. 141.

toriality. If, in the supposed case, D. and M. had been married at the Prussian Embassy in accordance with the forms required by the law of Prussia, their marriage would have been valid in England.

RULE 45.—Subject to the exception hereinafter ^{Rule 45.} mentioned, no marriage is valid which does not ^{Marriage,} comply, both as to the capacity (r) of the parties ^{when} and the form (s) of celebration, with Rule 44. ^{invalid.}

Capacity to marry depends upon the law of a person's ^{(i.) Want} domicil. ^{of capacity.}

"It is a well recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnised is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicil; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and

(r) *Sotomayor v. De Barros*, 3 P. D. 1, 5; *Brook v. Brook*, 9 H. L. C. 193, 234, 235.

(s) *Kent v. Burgess*, 11 Sim. 361; *In re Estate of McLoughlin*, Ir. L. R. 1 Ch. D. 421; *Lacon v. Higgins*, 3 Stark 78; *Butler v. Freeman*, Ambl. 303; *Swift v. Kelly*, 3 Knapp. 257; *Westlake*, s. 344; *Story*, s. 118.

"renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnised" (t).

"The learned judge" (u) (said Lord St. Leonards) came to the conclusion, after an elaborate review of the authorities, that a marriage contracted by the subjects of one country, in which they are domiciled, in another country, is not to be held valid if, by contracting it, the laws of their own country are violated. This proposition is more extensive than the case before us requires us to act upon, but I do not dissent from it" (x).

The principle that legal capacity to marry depends upon a person's *lex domicilii* may be applied by our courts either to marriages prohibited by English law and celebrated in a foreign country, or to marriages prohibited by a foreign law and celebrated in England.

(i) Marriages prohibited by English law.

A marriage with his deceased wife's sister, by a widower domiciled in England, is under this principle invalid, wherever celebrated. Thus D., a German, naturalised and domiciled in England, married M., also a German and his deceased wife's sister, by the half blood, at Frankfort, where she was domiciled, and such marriage was legal. He then returned to England, and continued to reside there till his death. It was held here that D. was under a disability to marry M., and that the disability of either party invalidated the marriage (y). So, again, where D., a widower, and M. his deceased wife's sister, both being domiciled in England, went for a short time to Denmark, and were there married, our courts held that such a marriage even though in accordance with the law of Denmark

(t) *Sottomayor v. De Barros*, 3 P. D. 1, 5, *per Curiam*.

(u) *Sir Cresswell Cresswell*.

(x) *Brook v. Brook*, 9 H. L. C. 193, 234, 235, *per Lord St. Leonards*.

(y) *Mette v. Mette*, 1 Sw. & Tr. 416, 28 L. J. (P. & M.) 117. There is no doubt that stress was in this case laid on D. being an English subject, but this was immaterial, D.'s *lex domicilii* being sufficient to invalidate the marriage.

was invalid (2), and all attempts to evade the law of England by marrying in a country where marriages with a deceased wife's sister are lawful have utterly failed in obtaining any sanction for such marriages from our courts. The grounds for such failure have been thus stated :

" It is quite obvious that no civilised state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions.

" A marriage between a man and the sister of his deceased wife, being Danish subjects domiciled in Denmark, may be good all over the world, and this might likewise be so, even if they were native born English subjects, who had abandoned their English domicile, and were domiciled in Denmark. But I am by no means prepared to say that the marriage now in question ought to be, or would be, held valid in the Danish courts, proof being given that the parties were British subjects domiciled in England at the time of the marriage, that England was to be their matrimonial residence, and that by the law of England such a marriage is prohibited as being contrary to the law of God. The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined " (a).

The principle applied by our courts to marriage with a deceased wife's sister will be applied by them to any other marriage by a person domiciled in England which comes

(2) *Brook v. Brook*, 9 H. L. C. 193. See, as to Scotch Law, *Fenton v. Livingstone*, 8 Macq. 467.

(a) *Brook v. Brook*, 9 H. L. C. 193, 212, 213, per *Campbell*, C.

within the prohibited degrees, such as a marriage by an uncle with a niece (*b*).

(ii) Marriages prohibited by foreign law.

A marriage prohibited by the law of the country where the parties are domiciled, and celebrated here is, though legal by the ordinary rules of English law, invalid in England.

D. and M., Portuguese subjects, domiciled in Portugal, were first cousins and on that account incapable by the law of Portugal of intermarrying with each other, without the dispensation of the Pope. While residing in England, but not domiciled there, they were married according to the forms required by English law. The marriage was held invalid by our courts (*c*).

Though in the judgment of the court stress is laid on the marriage being by Portuguese law "incestuous," and on the fact that the parties were Portuguese "subjects," these matters are almost certainly immaterial. The true *ratio decidendi* is, that "the question of

(*b*) English courts will of course hold invalid a marriage by any person who is prohibited from entering into it by English law. There is, further, no doubt that marriage with a deceased wife's sister is prohibited by English law. The question, however, who are the persons to whom this prohibition is intended to apply admits of controversy, and in fact three different views have been taken as to the answer to be given to it.

First.—The prohibition has been thought to apply to all persons whomsoever, whether British subjects or aliens. This is the natural view of those who hold that English law treats the marriage in question as strictly incestuous: *Brook v. Brook*, 9 H. L. C. 198, 230, 234, language of Lord *St Leonards*.

Secondly.—The prohibition has been held to apply to all British subjects and to all persons domiciled in England. This was, perhaps, the view of the court which gave judgment in *Mette v. Mette*, 1 Sw. & Tr. 416, 28 L. J. (P. & M.) 117.

Thirdly.—The prohibition may be considered to apply to all persons, whether British subjects or aliens, domiciled in England, and to such persons only. This on the whole would seem to have been the view of the House of Lords when giving judgment in *Brook v. Brook*, 9 H. L. C. 198. See especially language of *Campbell*, C., p. 212, and of Lord *Cranworth*, pp. 227, 228, and is (it is conceived) the sounder view. It is in conformity with *Sottomayor v. De Barros*, 8 P. D. 1, and is reconcilable with the colonial Acts making the marriages in question legal in the colonies.

(*c*) *Sottomayor v. De Barros*, 3 P. D. 1 (C. A.).

"personal capacity to enter into any contract is to be decided by the law of domicile" (d).

From the principle that capacity depends on the law of a person's domicile, it follows that the disability of either party (e), under the law of his or her domicile to contract a marriage with the other, invalidates the marriage. A suggestion has, however, been made judicially that the application of the principle should be limited to cases in which both of the parties are domiciled in a country by the laws of which they are incapable of intermarriage.

Suggested
limitation
to principle
that
capacity to
marry
depends
on *lex
domicilii*.

"Our opinion" [that parties cannot make a valid marriage who are under an incapacity by their *lex domicilii*] "is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognise the laws of a foreign state when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognised by the law of this country" (f).

The suggested limitation, however, to the application of the principle that capacity to marry depends upon a person's *lex domicilii* cannot, it is conceived, be permanently maintained. The introduction of the proposed limitation is not necessitated by any decided cases, is

(d) *Sottomayor v. De Barros*, 3 P. D. 1, 5, *per Curiam*.

(e) See *Mette v. Mette*, 1 Sw. & Tr. 416, 28 L. J. (P. & M.) 117.

Savigny, however, holds that an incapacity affecting a future wife according to the law of her domicile, but not affecting the future husband according to the law of his domicile, is immaterial. Hence, though he would approve of the decision in *Mette v. Mette*, he would hold, that if in that case the husband had been domiciled in Germany, whilst the wife had been domiciled in England, the marriage ought to have been held valid by our courts. See *Savigny*, s. 379, pp. 240, 241.

(f) *Sottomayor v. De Barros*, 3 P. D. 1, 6, 7, *per Curiam*.

illogical, and does away with the great advantage derived from basing the validity of a marriage on a broad and clear ground.

(ii.) Want
of form.

No marriage is valid which in respect of form (including in that term all the formalities, rites, and ceremonies of marriage) does not fall within the terms of sub-clauses (i), (ii), (iii), or (iv) of Rule 44 (*g*). To put the same thing in other words the general principle is that the validity of the marriage contract depends upon its being entered into in accordance with the law of the place of celebration (*h*); sub-clauses (ii), (iii), and (iv), state the exceptions to this principle, and what is here laid down is that no marriage is valid which does not fall within the general principle or within the exceptions thereto.

Marriages
invalid for
want of
due form.

The following are examples of marriages which are invalid on account of not fulfilling the conditions as to form of Rule 44.

In 1838 (*i*), D. and M., English persons domiciled in England, are married at the English church, at Antwerp, by a clergyman of the Church of England, in the presence of the English Consul. Formalities required in respect of residence and otherwise by Belgian law are omitted. The marriage is invalid (*k*).

In 1833, D. and M., Irish persons domiciled in Ireland, go in England through a ceremony of marriage celebrated by a Roman Catholic priest. The marriage is invalid (*l*).

D. and M., persons domiciled in Scotland, marry in

(*g*) See pp. 200, 201, *ante*.

(*h*) This is merely an application to marriage of the general principle that the validity of a contract depends as regards its form on the law of the place where it is made (*lex loci contractus*).

(*i*) And therefore prior to the Foreign Marriage Act, 12 & 13 Vict. c. 68 (1849).

(*k*) *Kent v. Burgess*, 11 Sim. 361.

(*l*) *In re Estate of McLoughlin*, Irish L. R. 1 Ch. D. 421. In each of the foregoing cases the marriage, but for its not conforming to the *lex loci contractus*, would be valid by the English Common Law.

England, by acknowledging themselves to be man and wife in the presence of third parties. The marriage is invalid (*m*).

D. and M., persons domiciled in England, go through the ceremony of marriage in Japan. The marriage is performed by a Presbyterian minister. The marriage is invalid (*n*).

D. and M., persons domiciled in England, go through the ceremony of marriage on board a British man-of-war, when on the high seas. The ceremony is performed by the captain, who uses the service of the Church of England. The marriage is invalid (*o*).

D., a Frenchman, marries M., an Englishwoman and British subject, at the chapel of the French Embassy, without complying with the requirements of English law as to banns, licence, &c. The marriage is invalid (*p*).

Exception.—A marriage celebrated in England is not invalid on account of any incapacity of either of the parties which, though imposed by the law of his or her domicile, is of a kind to which our courts refuse recognition.

Marriage in England not invalid on account of incapacity not recognised by English courts.

(*m*) It would be held invalid in Scotland, as well as in England: 2 *Fraser, Husband and Wife*, 1309, 1310; *Maccullock v. Maccullock*, 2 Paton. 33, M. 4591; *Cullen v. Gossage*, 12 D. 633.

(*n*) *Reg. v. Millis*, 10 Cl. & F. 534. It is presumed in this illustration that the ceremony is not sufficient to constitute a marriage according to the law of Japan. If it did, the marriage, being in accordance with the local form, would be valid.

Whether, if D. and M. had been persons domiciled in Scotland, their marriage would, under the circumstances, be held valid in England, is perhaps an open question. See pp. 208, 209, *ante*.

(*o*) There is no legal authority for holding such a marriage good. Its validity is inconsistent with the principle maintained by the House of Lords in *Reg. v. Millis*, 10 Cl. & F. 534.

(*p*) *Petrie v. Tondear*, 1 Hagg. Const. 136. Supposing that Exception 3 to Rule 44 (see p. 216, *ante*) can be maintained, the combined effect of that exception and of Rule 45, p. 217, *ante*, is that no one can contract a valid marriage who is under a legal incapacity, either by the law of the country where the marriage is celebrated (*lex loci contractus*), or by the law of the country where he is domiciled (*lex domicilii*).

D., a black, domiciled in a country where marriages between whites and blacks are prohibited, and M., a white woman also there domiciled, come to England and without having acquired an English domicil are married there. The marriage is valid (q).

The general principle on which such a marriage would be held valid is, that the incapacity constitutes a penal or privative *status* to which our courts will not give extra-territorial effect (r).

On the same principle, the marriage of a monk or a nun would be held valid here, even though he or she might be incapable of marriage by the law of his or her domicil (s).

(q) See as to the question whether such marriages can now be prohibited in any State of the American Union, *State v. Gibson*, 10 Am. Rep. 42; *Burns v. State*, 17 Am. Rep. 34.

(r) See Rule 24, p. 161, *ante*.

(s) See *Coke Litt.*, p. 136a; 2 *Coke Inst.*, p. 687.

CHAPTER V.

DIVORCE (a).

General Principle.

RULE 46.—Jurisdiction in matters of divorce depends, in general, upon the domicile of the parties to a marriage at the time of the commencement of proceedings for divorce. Hence, in general,

Rule 46.
Jurisdiction in matters of divorce depends in general on domicile.

- (1) a Divorce Court (b) of any country where such parties are then domiciled has jurisdiction to dissolve their marriage (c);

(a) *Browne Divorce* (3rd ed.), pp. 1—24.

Phillimore, ss. 491—521.

Westlake, ss. 349—365.

Story, ss. 200—230e.

Wharton, ss. 204—239.

Savigny, s. 379 (see Guthrie's Note, pp. 248—250).

Bar, s. 92.

1 *Felix*, p. 68, note (a).

2 *Bishop Marriage and Divorce*, ss. 113—207.

(b) The term Divorce Court is used as a name for any court, such as the English Probate, Divorce and Admiralty Division of the High Court of Justice, or the Scotch Court of Session, which, under whatever style, has, by the law under which the court exists, power to take cognizance of matters of divorce.

(c) See *Wilson v. Wilson*, L. R. 2 P. & D. 435; *Conf. Brodie v. Brodie*, 30 L. J. (P. & M.) 185; *Browne Divorce*, p. 20; *Shaw v. Gould*, L. R. 3 H. L. 55; *Dolphin v. Robins*, 29 L. J. (P. & M.) 11, 7 H. L. C. 390; *Yelverton v. Yelverton*, 1 Sw. & Tr. 574; *Le Sueur v. Le Sueur*, 1 P. D. 139.

- (2) no court of any other country has jurisdiction to dissolve their marriage (c).

The principle now in the main adopted by English courts (*d*) appears to be that jurisdiction in matters of divorce depends upon domicile, or, in other words, that the question whether parties to a marriage ought to be divorced is one which concerns the authorities of the country where they live and have their legal home, and that, therefore, the courts of the country where the parties are so living, at the time of the demand for a divorce, are the courts to which in general ought to be referred the question, whether the marriage between the parties should or should not be dissolved.

"It is," says a high judicial authority, "the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone

(c) *Firebrace v. Firebrace*, 47 L. J. (P. & M.) 41; but see *Niboyet v. Niboyet*, 4 P. D. 1; *Yelverton v. Yelverton*, 1 Sw. & Tr. 574; Compare *Duggan v. Duggan* (Australian Case), 64 L. T. 152.

(d) They, at one time, undoubtedly inclined to the quite different principle that the right to divorce depended upon the terms of the marriage contract, and, therefore, upon the law under which the marriage was celebrated, and hence, held that the jurisdiction in matters of divorce belonged exclusively to the courts of the country under the law of which the marriage took place, which was in the great majority of instances (if not always) the country where the marriage was celebrated. See *Tovey v. Lindsay*, 1 Dow. 117; *Lolley's case*, 2 Cl. & F. 567; *McCarthy v. De Caix*, *ibid.*, 568; *Theories of Divorce*, App., Note VI., and *Effect of Foreign Divorce on English Marriage*, App., Note VII. See, however, as making it difficult to determine what is the exact principle adopted by our courts, *Niboyet v. Niboyet*, 4 P. D. 1.

"can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another" (e).

"It seems," says Lord Justice Brett, "that the only court which, on principle, ought to entertain the question of altering the relation in any respect between parties admitted to be married, or the *status* of either of such parties arising from their being married, on account of some act which by law is treated as a matrimonial offence, is a court of the country in which they are domiciled at the time of the institution of the suit. If this be a correct proposition, it follows that the court must be a court of the country in which the husband is at the time domiciled, because it is incontestable that the domicile of the wife, so long as she is a wife, is the domicile which her husband selects for himself, and at the commencement of the suit she is, *ex hypothesi*, still a wife" (f).

Rule 46 embodies the principle expressed in these judicial dicta. The two subordinate clauses of the rule point to the consequences which ensue from the application of that principle. With reference, however, to the application of the principle stated in the rule, two points require notice.

(e) *Wilson v. Wilson*, L. R. 2 P. & D. 485, 442, judgment of Lord Penzance. This statement of the law is in conformity with the expressions of Lord Westbury in *Shaw v. Gould*, L. R. 3 H. L. 55, 85, cited p. 236, *post*, but is not, it must be admitted, in harmony with the language of the majority of the court in *Niboyet v. Niboyet*, 4 P. D. 1.

(f) *Niboyet v. Niboyet*, 4 P. D. 1, 13, 14, judgment of Brett, L.J. The rest of the court, James, L.J., and Cotton, L.J., do not, it should be noticed, assent to the principle laid down by Brett, L.J.; but, considering the state of the authorities, the general view maintained by Brett, L.J., is, it is submitted, still to be considered as probably sound. *Niboyet v. Niboyet*, if it be rightly decided, may, as far as the actual decision goes, be explained as extending the number of exceptional cases in which residence gives jurisdiction in matters of divorce. See Sub-Rule 2, Exception 1, p. 281, *post*. The dicta of the majority of the court cannot be so explained, but they are, it is submitted, opposed to other dicta of weight, and cannot be taken as absolutely authoritative. See *Recent Cases on Domicil*, App., Note X.

First.—The words “in general” point to the fact that our courts have not fully or consistently carried out the principle that jurisdiction in matters of divorce is dependent upon domicil. Though adhering in the main to this principle they certainly sometimes base jurisdiction upon other circumstances than domicil, such, for example, as residence not amounting to domicil (*h*), and are possibly still influenced by the theory (*i*) that the right to divorce depends on the terms of the marriage contract.

Secondly.—The criterion of jurisdiction adopted by any court determines the limits within which such court will, unless otherwise expressly enjoined by the law to which the court is subject, exercise power to grant divorces, or, in other words, claim jurisdiction, and also determines the limits within which the court will admit the right, or, in other words, the jurisdiction of foreign tribunals to grant divorces. Hence the principle that jurisdiction depends upon domicil modified by the weight given by our courts to other considerations, gives rise to the following sub-rules and exceptions. Sub-Rules 1 & 2, with the exceptions thereto, refer to the jurisdiction of the English Divorce Court, or, in other words, to English divorces. Sub-Rules 3 & 4, and the exceptions thereto, refer to the jurisdiction of foreign tribunals, or, in other words, to foreign divorces.

A. *English Divorces.*

When
Divorce
Court has
jurisdiction
to
grant
divorces.

SUB-RULE 1.—The English Divorce Court has jurisdiction to dissolve the marriage of any parties domiciled in England at the commencement of proceedings for divorce.

The jurisdiction of the court in respect of such parties is not affected by

(*h*) *Niboyet v. Niboyet*, 4 P. D. 1.

(*i*) *Theories of Divorce*, App., Note VI.

- (1) the residence of the parties, or
- (2) the allegiance of the parties, or
- (3) the domicile of the parties at the time of the marriage, or
- (4) the place of the marriage, or
- (5) the place where the offence, in respect of which divorce is sought was committed.

D. and M. were married in India. Adultery was committed by M. in India. D. being domiciled in England instituted a suit for divorce against M. It was held that the court had jurisdiction to grant a divorce (*k*). Jurisdiction dependent on domicile.

D. and M. were a Scotch husband and wife domiciled in Scotland, who had married in Scotland. M., during the continuance of the Scotch domicile, committed adultery in Scotland. D. afterwards acquired an English domicile, and then applied to the English Divorce Court for a divorce. At the time of the application, and throughout the proceedings, M., the wife, was in fact resident in Scotland. In prior proceedings before the Scotch courts by M. against D., these courts held that D. was domiciled in Scotland. The English Divorce Court, after finding that, as a matter of fact, D. had acquired an English domicile, held that the court had jurisdiction to pronounce, and did, in fact, pronounce a divorce between D. and M. (*l*).

If it be borne in mind that Scotland and Ireland are as regards divorce to be considered foreign countries (*m*) it will be seen that the decision in *Wilson v. Wilson* supports to the full the doctrine that the Divorce Court has jurisdiction over all persons domiciled in England.

Of the various other circumstances which might be thought material none are, it is conceived, of importance as Not limited by *limiting* (*n*) the jurisdiction of the court.

(*k*) *Ratcliffe v. Ratcliffe*, 1 Sw. & Tr. 467.

(*l*) *Wilson v. Wilson*, L. R. 2 P. & D. 435.

(*m*) *Yelverton v. Yelverton*, 1 Sw. & Tr. 574, 585.

(*n*) Some of them may be of importance as giving jurisdiction.

residence ; Residence as contrasted with domicile (*p*) is certainly unimportant. D. and M. are domiciled in England, but reside in France. M. commits adultery in Paris. D., though residing abroad, can obtain a divorce from the Divorce Court (*q*).

alle-
giance.

Allegiance is the tie by which a person is connected with a state (*r*) as being a subject of the sovereign of such state, and it might be thought that as a person's connection with a particular political society depends upon his allegiance, or in more popular language his nationality, jurisdiction to declare whether a given person is to be considered married or unmarried would belong to the courts of the state or nation of which he is a member or citizen. This, however, is not the view of English tribunals. In perfect consistency with the view that civil as contrasted with political *status* depends upon domicile they hold that the jurisdiction of an English court to grant a divorce is not affected by the allegiance of the parties. D. and M. are French subjects domiciled at Manchester, where M. commits adultery. The Divorce Court has jurisdiction to grant a divorce (*s*).

Domicil of
parties at
time of
marriage,
&c.

That the domicile of the parties at the time of the marriage, the place of the marriage, or the place where the offence, in respect of which divorce is sought, was committed, has no effect to limit the jurisdiction of the court is certain (*t*).

Divorce
Court no
jurisdic-

SUB-RULE 2.—Subject to the exceptions herein-after mentioned, the English Divorce Court has no

(*p*) See *Dolphin v. Robins*, 7 H. L. C. 390, for expressions of Lord Chelmsford contrasting residence and domicile, and p. 43, note (*c*), *ante*.

(*q*) See *Gillis v. Gillis*, 8 Ir. L. R. Eq. 597.

(*r*) For difference between state and country see pp. 31—33, *ante*.

(*s*) *Niboyet v. Niboyet*, 4 P. D. 1. In this case no objection seems to have been made to the divorce on the ground of Mr. Niboyet being a French subject, and the mere fact of a foreign allegiance does not appear in any reported case to have been treated by the court as a ground for declining jurisdiction.

(*t*) *Wilson v. Wilson*, L. R. 2 P. & D. 435, is sufficient without other authorities to establish this. See *Ratcliffe v. Ratcliffe*, 1 Sw. & Tr. 467.

jurisdiction to dissolve the marriage of any parties not domiciled in England at the commencement of proceedings for divorce (*u*) (?)

tion over parties not domiciled in England.

D., and M. his wife, are domiciled in Ireland. D. institutes proceedings for divorce against M. in England. The Divorce Court has probably not jurisdiction to grant a divorce (*x*).

This Sub-Rule will be found, it is submitted, in conformity with the general run of the authorities on the subject of jurisdiction in matters of divorce. It is, however, opposed to the opinion of the majority of the Court of Appeal in a recent case (*y*), and must therefore be considered as open to doubt. The case itself may, even if well decided, be explained as coming within one or more of the exceptions to the Sub-Rule (*z*).

Exception 1 to Sub-Rule.—The Divorce Court has under exceptional circumstances jurisdiction to dissolve a marriage where the parties are (or possibly where one of them is (*u*)), at the commencement of proceedings for divorce, resident though not domiciled in England (*b*).

Jurisdiction sometimes grounded on residence without domicil.

D., a Frenchman, married at Gibraltar M., an English-woman and British subject. D. resided as French consul for several years in England, but retained his French domicil. While D. was resident in England M. presented a petition for divorce, alleging adultery committed in England, and desertion. D. appeared, but under protest. It was held by the Court of Appeal, reversing the decision of the court below, that the Divorce Court had jurisdiction to

(*u*) *Yelverton v. Yelverton*, 29 L. J. (P. & M.) 34, 1 Sw. & Tr. 574.

(*x*) See *Yelverton v. Yelverton*, 29 L. J. (P. & M.) 34, 1 Sw. & Tr. 574; *Le Sueur v. Le Sueur*, 1 P. D. 139; *Tollemache v. Tollemache*, 1 Sw. & Tr. 557, and judgment of Brett, L.J., in *Niboyet v. Niboyet*, 4 P. D. 1, 9.

(*y*) *Niboyet v. Niboyet*, 4 P. D. 1.

(*z*) Exception 1 and Exception 3, p. 233, *post*. See further *Recent cases on domicil*, App., Note X.

(*a*) *Brodie v. Brodie*, 30 L. J. (P. & M.) 185, 2 Sw. & Tr. 259.

(*b*) *Niboyet v. Niboyet*, 4 P. D. 1.

grant a divorce (*c*), and a divorce was subsequently granted.

D. and M., British subjects, were married in Tasmania. They afterwards acquired an Australian domicile. M. committed adultery in Australia and continued to reside there apart from D. He became *bond fide* and permanently resident in England, where he took proceedings against M. for a divorce. It was held that the Divorce Court had jurisdiction to grant a divorce (*d*).

These cases, if rightly decided, certainly show that residence not amounting to domicile may under some circumstances give the court jurisdiction. They do not of necessity go further than this. The opinions, indeed, expressed by the majority of the court in *Niboyet v. Niboyet* conflict with the principle that jurisdiction depends upon domicile (*e*). But the facts that the wife was a British subject, that the divorce was obtained on her petition (*f*), that the marriage was made in the British dominions, and that French law does not allow of divorce at all, may possibly be held to make the case exceptional. *Brodie v. Brodie* may be reconciled with the principle that jurisdiction depends upon domicile. "The judgment," says Brett, L.J., "was [in that case as follows]: 'We say nothing "as to what the effect of the evidence might be in a testamentary suit; we think that the petitioner was *bond fide* "resident here, not casually or as a traveller. After he "became resident here his wife was carrying on an adulterous intercourse in Australia. He is therefore entitled "to a decree *nisi* for a dissolution of the marriage.' If "this was held to be a domicile, it is consistent with all the "cases; if it is to be taken as a decision that there can be "a minor species of domicile sufficient for one purpose and

(*c*) *Niboyet v. Niboyet*, 4 P. D. 1.

(*d*) *Brodie v. Brodie*, 30 L. J. (P. & M.) 185, 2 Sw. & Tr. 259.

(*e*) See especially judgment of James, L.J., in *Niboyet v. Niboyet*, 4 P. D. 1, 6.

(*f*) See Exception 3, p. 233, *post*.

"not for another, I know of no authority or ground of
"reason for such a distinction. I cannot agree with it" (*h*).

Exception 2 to Sub-Rule.—The Divorce Court has jurisdiction to dissolve a marriage between parties not domiciled in England at the time of the proceedings for divorce where the defendant has appeared absolutely and not under protest (*i*). Jurisdiction where defendant appears without protest.

This exception rests on the principle that the defendant by appearance without protest submits to the jurisdiction of the Court.

Exception 3 to Sub-Rule.—The Divorce Court has jurisdiction to dissolve an English marriage between British subjects on the petition of a wife who is resident though not domiciled in England (*k*). Jurisdiction on petition of wife resident in England.

D. and M., natural born British subjects, married in 1844 in England. In 1848 they separated. D., the husband, went after the separation to America, and became domiciled there. In 1853 D. married N. in America. M., who had never left England, applied in 1860 to the Divorce Court for a divorce. The divorce was granted (*k*).

This exception may be vindicated on the ground of the injustice to a wife, who is a British subject, of pressing to its full extent the legal fiction that she is always domiciled in the same country as her husband. The principle of this exception may perhaps be extended to cases where the wife though not the husband was a British subject at the time of the marriage.

B. Foreign Divorces.

SUB-RULE 3.—Subject to the exceptions herein—Court of foreign

(*h*) *Niboyet v. Niboyet*, 4 P. [D. 1, 18, 19, per Brett, L.J. See *Recent Cases on Domicil*, App., Note X.

(*i*) *Zyclinski v. Zyclinski*, 2 Sw. & Tr. 420.

(*k*) *Deck v. Deck*, 29 L. J. (P. & M.) 129.

country
has jurisdic-
tion to
dissolve
marriage
of parties
not there
domiciled.

after mentioned, the Divorce Court of a foreign country has jurisdiction to dissolve the marriage of any parties domiciled in such foreign country at the commencement of proceedings for divorce, and a divorce by such a court of such parties is valid (*m*).

This Sub-Rule applies to

- (1) an English marriage,
- (2) a foreign marriage.

This Sub-Rule, in effect, states that a divorce granted by the Divorce Court of the foreign country where the parties to a marriage are domiciled at the time of the divorce, is valid in England, without reference to the law of the country where the marriage is celebrated, or to the law of the domicile of the parties at the time of the marriage. This statement of the law is, it is conceived, a just inference from the authorities to be found on the subject. But the question whether the principle thus broadly laid down can be maintained to its full extent is, it must be admitted, open to doubt (*n*), and somewhat different considerations apply to English and to foreign marriages respectively.

Meaning
of English
marriage.

(1) *English Marriages*.—An English marriage means a marriage which, wherever celebrated, is made between parties of whom the husband is at the time thereof domiciled in England (*o*). At one period, no doubt, every marriage celebrated in England was held an English marriage (*p*), though it was never apparently thought that every marriage celebrated abroad was a foreign marriage, and, on the whole, the definition of the term which makes the character of the marriage depend on the domicile of the

(*m*) See *Shaw v. Gould*, L. R. 3 H. L. 55; *Dolphin v. Robins*, 7 H. L. C. 390; *Pitt v. Pitt*, 4 Macq. 627.

(*n*) *Effect of Foreign Divorce on English Marriage*, App., Note VII.

(*o*) See *Warrender v. Warrender*, 2 Cl. & F. 488; *Geils v. Geils*, 3 H. L. C. 280.

(*p*) See *McCarthy v. De Caix*, 2 Cl. & F. 568.

husband appears to be correct, and in the main to conform to modern usage (q).

Weighty judicial dicta support the doctrine as to English marriages stated in the Sub-Rule.

"It is the strong inclination of my own opinion," says Lord Penzance, "that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled" (r).

"In no case," says the same judge in another case, "has a foreign divorce been held to invalidate an English marriage between English subjects where the parties were not domiciled in the country by whose tribunals the divorce was granted. Whether, if so domiciled, the English courts would recognise and act upon such a divorce appears to be a question not wholly free from doubt; but the better opinion seems to be that they would do so if the divorce be for a ground of divorce recognised as such in this country, and the foreign country be not resorted to for the collusive purpose of calling in the aid of its tribunals. To my mind it is manifestly just and expedient that those who may have permanently taken up their abode in a foreign country, resigning their English domicil, should, in contemplation of English law, be permitted to resort with effect to the tribunals exercising jurisdiction over the community, of which, by their change of domicil, they

Effect of
foreign
divorce on
English
marriage.

(q) See, however, remarks of Lord Westbury in *Shaw v. Gould*, L. R. 3 II. L. 55, criticising the statements of Lord Brougham in *Warrender v. Warrender*, 2 Cl. & F. 488. The different meanings given to the term English marriage are connected with the different senses affixed at different times to the expression *lex loci contractus*. As long as that term was taken to mean the law of the country where a contract is made, the expression English marriage naturally meant marriage celebrated in England. When the term is understood to mean the law of the country with reference to which a contract is made, English marriage is naturally taken to mean a marriage made with reference to the law of an English domicil.

(r) *Wilson v. Wilson*, L. R. 2 P. & D. 435, 442. See judgment of Brett, L.J., in *Niboyet v. Niboyet*, 4 P. D. 1, 19.

"have become a part, rather than they should be forced back for relief upon the tribunals of the country they have abandoned" (s).

"The position," says Lord Westbury, "that the tribunal of a foreign country having jurisdiction to dissolve the marriages of its own subjects, is competent to pronounce a similar decree between English subjects who were married in England, but who before and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a *bond fide* suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the judges in *Lolley's case*" (t).

The force of these dicta is increased by the consideration that the Divorce Court assumes in its own practice that domicile is always sufficient to give jurisdiction in matters of divorce, and that the Divorce Act invalidates all arguments based on the indissolubility of an English marriage, and being applicable to marriages celebrated before the passing of the Act, may be taken as a legislative declaration that the right to divorce does not depend on the terms of the marriage contract (u).

No decision further is reported which decides that under the present state of the English divorce law a foreign divorce cannot dissolve an English marriage (x), and though it be true that no case determines that an English marriage can be dissolved by a foreign divorce, the preponderance both of authority and of principle is, it is

(s) *Shaw v. Attorney-General*, L. R. 2 P. & D. 156, 161, 162, *per* Lord Penzance.

(t) *Shaw v. Gould*, L. R. 3 H. L. 55, 85, judgment of Lord Westbury.

(u) See *Theories of Divorce*, App., Note VI.

(x) *McCarthy v. De Caix* (2 Cl. & F. 568) is, even if rightly decided, not an authority applicable to the state of the law existing since the Divorce Act of 1857. Nor does *Lolley's Case* (2 Cl. & F. 567) necessarily decide more than that the foreign court of a country where the parties to an English marriage were not domiciled had no jurisdiction to dissolve their marriage. *Effect of Foreign Divorce on English Marriage*, App., Note VII.

conceived, strongly in favour of the validity of such divorce when the parties are domiciled in the country where it is granted.

D. and M., persons domiciled in England, are married in London. After the marriage they acquire a domicile in Scotland. M. commits adultery in Scotland, and D. still being domiciled in Scotland, is divorced from M. by the Court of Session. The divorce is probably valid in England.

(2) *Foreign Marriages*.—A foreign marriage means any marriage which does not fall within the definition already given of an English marriage (y). Hence the marriage in England of persons domiciled at the time of the marriage in Prussia is a foreign marriage.

Meaning of foreign marriage.

The power of a foreign divorce granted by the courts of the country, *e.g.*, Prussia, where the parties are domiciled to dissolve a foreign marriage may come before English tribunals under various different circumstances.

Effect of divorce in foreign country on foreign marriage.

First.—The parties may be, at the time of the divorce, citizens of the country—Prussia—where the divorce is granted. In this case English courts will hold it valid (z).

(1) Where parties citizens of country.

If the parties in the case supposed were married in Prussia and domiciled there at the time of their marriage, no question as to the validity of the divorce could arise. If, again, the parties, though domiciled in Prussia at the time of their marriage, were married out of Prussia, *e.g.*, in France or in England, there can, it is conceived, be little doubt that their divorce would now be held valid in England (a). If, however, they were at the time of the marriage domiciled out of Prussia, *e.g.*, in France, the validity in England of their divorce is perhaps open to

(y) See p. 234, *ante*. If an English marriage be so defined as to include all marriages celebrated in England, the definition of a foreign marriage must be so restricted as to meet this extension of the term English marriage. *Warrender v. Warrender*, 2 Cl. & F. 488; *Geils v. Geils*, 3 H. L. C. 280.

(z) *Cottingham's Case*, 2 Swanst. 326.

(a) *Warrender v. Warrender*, 2 Cl. & F. 488. This, however, is opposed to *McCarthy v. De Caix*, 2 Cl. & F. 568.

question; but the divorce would probably, even in this case, be held valid (b).

(2) Where the parties are not citizens of the country.

Secondly.—The parties may, at the time of the divorce, not be citizens of the country—Prussia—where the divorce is granted. Even in this case our courts would probably adhere to the principle that jurisdiction depends upon domicile, and would, therefore, hold that a Prussian Divorce Court could dissolve the marriage of, for instance, French citizens domiciled at Berlin.

It must, however, be admitted, that where citizenship and domicile differ, cases of considerable difficulty may arise, especially in dealing with the position of citizens of countries which, like Italy, make personal capacity depend not upon domicile, but upon allegiance, and, further, do not recognise divorce as regards their own citizens (c). D. and M., Italian subjects, marry in Italy whilst there domiciled. They afterwards acquire a Prussian domicile, and whilst domiciled in Prussia, are divorced by a Prussian court. They neither of them change their allegiance, but retain their Italian citizenship. D., after the divorce, and still retaining his Prussian domicile, marries N. in England during the life of M. The divorce and second marriage are both invalid in Italy. Probably the English courts would hold the Prussian divorce, and, therefore, the second marriage valid.

Foreign divorce obtained by collusion not valid.

Exception 1 to Sub-Rule.—A foreign divorce is not valid which is obtained by the collusion or fraud of the parties.

D. and M., persons married in England, and domiciled there at the time of the marriage, go to Scotland, and by collusion obtain a divorce. The divorce is held invalid by the English courts (d).

First.—The kind of fraud which, as far as can be judged of by the cases, is contemplated by our courts as invalidating a foreign divorce, is an attempt by collusion to get a

(b) *Conf. Connelly v. Connelly*, 7 Moore P. C. 438.

(c) See *Fiore*, ss. 117—134.

(d) *Shaw v. Gould*, L. R. 3 H. L. 55.

Dolphin v. Robins, 7 H. L. C. 390, 29 L. J. (P. & M.) 11.

divorce in another country, *e.g.*, in Scotland, which could not be obtained in England. The fraud is closely connected with the assumption of what is called a temporary domicil, or, in plain terms, a residence not amounting to domicil, taken up only with a view to give the Scotch courts jurisdiction. The divorce, therefore, in the cases decided was invalid, because the parties were not domiciled in Scotland, and might have been decided without any reference to fraud, and it does not appear certain that if the parties had been really domiciled in Scotland, the so-called fraud would have been sufficient to invalidate the divorce (*e*).

Secondly.—It is not clear how far this exception can be taken to apply to a divorce which dissolves a foreign marriage. Suppose, for example, that a Prussian Divorce Court were to dissolve the marriage of French citizens domiciled in Prussia. It may be doubted how far our courts would hold the divorce invalid, on account of its being obtained by collusion between the parties.

Exception 2 to Sub-Rule.—A foreign divorce is not valid if the proceedings are conducted in a way contrary to natural justice.

Foreign divorce not valid where procedure contrary to justice.

D. and M. were married in England. M., who was residing in Iowa, presented a petition to the courts of that State for a divorce from D. Notice of the proceedings was, by direction of the court of Iowa, inserted in the local papers. No other notice was given to D., who was not resident in Iowa. M. obtained a divorce. It was held here to be invalid (*f*).

Exception 3 to Sub-Rule.—A foreign divorce of the parties to an English marriage, for a cause for which divorce could not be obtained in England, is not valid (?)

Foreign divorce of English marriage not valid if no cause for divorce by English law.

D. and M., English persons married in England, and

(*e*) See *Shaw v. Gould*, L. R. 3 H. L. 55, 87, judgment of Lord Westbury.

(*f*) *Shaw v. Attorney-General*, L. R. 2 P. & D. 158.

there domiciled at the time of their marriage, afterwards obtain a Prussian domicile, and are divorced at Berlin, for incompatibility of temper. Such divorce being for a cause not recognised as a ground of divorce in England is, if the exception hold good, invalid.

The exception is suggested by the language of some judges, who apparently limit the jurisdiction of a foreign court to dissolve an English marriage to cases in which a divorce is granted on grounds recognised as a cause of divorce in this country (*g*). But the validity of the exception is not beyond doubt. It does not rest on a single decided case, and is clearly a mere deduction from the principle which English courts have now, on the whole, surrendered, that the right to divorce depends on the terms of the marriage contract.

Court of foreign country has no jurisdiction to dissolve marriage of parties not there domiciled.

SUB-RULE 4.—Subject to the possible exception hereinafter mentioned, the Divorce Court of a foreign country has no jurisdiction to dissolve the marriage of parties not domiciled in such foreign country at the commencement of proceedings for divorce, and a divorce granted by such court to parties not then domiciled in such country is not valid (*h*).

As to English marriages.

This rule certainly holds good as to English marriages.

“In no case has a foreign divorce been held to invalidate an English marriage between English subjects where the parties were not domiciled in the country by whose

(*g*) See *Shaw v. Attorney-General*, L. R. 2 P. & D 156, 161, judgment of Lord Penzance, and judgment of James, L.J., *Niboyet v. Niboyet* 4 P. D. 1, 8.

(*h*) *Pitt v. Pitt*, 4 Macq. H. L. 627.

Dolphin v. Robins, 7 H. L. C. 390.

Shaw v. Gould, L. R. 3 H. L. 55.

Shaw v. Attorney-General, L. R. 2 P. & D. 156.

Sinclair v. Sinclair, 1 Const. 294.

Tollemache v. Tollemache, 1 Sw. & Tr. 557.

"tribunals the divorce was granted" (i). The Scotch courts have constantly claimed the right to dissolve English marriages where the parties have acquired no real domicile in Scotland, but have merely resided there a sufficient time to give the Scotch courts jurisdiction, according to one view of Scotch law (k), and this claim has been consistently repudiated by English tribunals. In spite, therefore, of some doubts which have been expressed on the subject (l), "it must be taken now as clearly decided that the Scotch "court has" [as regards, at any rate, any effects in England] "no power to dissolve an English marriage where the "parties are not really domiciled in Scotland" (m); and, further, that the same doctrine applies to all foreign courts (n).

D. and M., persons domiciled in England, are married at Greenwich. D., the husband, afterwards resides, but does not obtain a domicile in Scotland. He then applies for and obtains a divorce from the Court of Session. The divorce is invalid (o).

It is probable that English tribunals will apply the same rule to a foreign divorce purporting to dissolve a foreign marriage, as to a foreign divorce purporting to dissolve an English marriage, and that, therefore, a foreign divorce is invalid in England in the case of a foreign marriage, if the parties to the marriage are, at the time of the divorce, not domiciled in the country where the court granting the divorce exercises jurisdiction. As to foreign marriages.

D. and M., domiciled French subjects, are married in France. While still retaining their French domicile they

(i) *Shaw v. Attorney-General*, L. R. 2 P. & D. 156, 161, 162, per Lord Penzance.

(k) See, however, *Pitt v. Pitt*, 4 Macq. 627, which makes it doubtful whether even, according to the law of Scotland, the Scotch courts have, under such circumstances, the right to pronounce a divorce.

(l) See expressions of Lord Chelmsford in *Shaw v. Gould*, L. R. 3 H. L. 55, 77.

(m) *Dolphin v. Robins*, 7 H. L. C. 390, 414, per Lord Cranworth.

(n) *Lolley's Case*, 2 Cl. & F. 567; *McCarthy v. De Cais*, *Ibid.*, 568.

(o) See *Shaw v. Gould*, L. R. 3 H. L. 55. *Dolphin v. Robins*, 7 H. L. C. 390, 29 L. J. (P. & M.) 11; *Tollemache v. Tollemache*, 1 Sw. & Tr. 557.

are divorced in Belgium, where they are residing. The divorce is probably not valid in England (*p*).

Divorce
possibly
valid if
held so by
courts of
domicil.

Possible Exception to Sub-Rule.—The Divorce Court of a country where the parties to a marriage are not domiciled has jurisdiction to dissolve their marriage, if the divorce granted by such court would be held valid by the courts of the country where the parties are domiciled.

The theory maintained by Italian lawyers appears to be (*q*), that jurisdiction in matters of divorce depends not upon the domicil, but upon the nationality of the parties. The following case might therefore arise :

D. and M., Prussian subjects married in Prussia, are domiciled at Turin. While there domiciled they obtain a divorce in Prussia. Italian courts would apparently hold the divorce valid. It may be conjectured, that under the circumstances, English tribunals would hold that D. and M. were, in effect, in the position of persons divorced by the courts of their domicil, and would, therefore, hold the divorce valid.

Effect of Divorce.

Rule 47.

Valid
foreign
divorce
same effect
in Eng-
land as
English
divorce.

RULE 47.—The effects in England of a valid divorce granted by a foreign court are the same as the effects of a divorce granted by the English Divorce Court.

D. and M., American citizens domiciled in one of the

(*p*) See *Sinclair v. Sinclair*, 1 Const. 294, and judgment of Sir Wm. Scott, p. 297. Nice questions may, however, be raised as to the effect in England of a foreign divorce granted in a country where the parties are not domiciled.

D. and M. are Prussian subjects who when domiciled in Prussia are married in Berlin. They afterwards acquire a French domicil, and while domiciled in France obtain a divorce in Prussia. Is the divorce valid in England ?

(*q*) *Fiore*, ss. 131, 132.

States of the Union, are there divorced. The laws of the State prohibit D. from marrying N., with whom he has committed the offence for which the divorce was granted. D. marries N. in England. The marriage will probably be held valid in England (r).

Decision on Validity of Marriage.

RULE 48.—The English Divorce Court has jurisdiction to enquire into the validity of any marriage celebrated in England (s).

Rule 48.

Divorce
Court
enquires
into
validity of
marriage
celebrated
in
England.

D. and M., French subjects domiciled in France, are married in London in accordance with all the formalities required by English law, but without the consents required by French law. The Divorce Court has jurisdiction to determine whether the marriage is valid (t).

The question in such a case is whether a valid marriage has or has not been contracted in England? Our courts may determine this question without directly impugning the doctrine that a marriage admitted to be valid can be dissolved only by the courts of the country where the parties are domiciled at the time of the proceedings for divorce.

(r) See *Commonwealth v. Lane*, 18 Am. Rep. 509. This case and the other American cases there cited, *Stevenson v. Gray*, 17 B. Monr. 193; *Ponsford v. Johnson*, 2 Blatch. 51, shew, in spite of some contradictory decisions, the view of the American courts, which probably would also be the view of our courts. See, further, 2 *Bishop, Marriage and Divorce* (4th ed.), ss. 698—704. See Rule 24, p. 121, *ante*.

(s) *Simonin v. Mallac*, 2 Sw. & Tr. 67, 29 L. J. (P. & M.) 97; *Sottomayor v. De Barros*, 8 P. D. 1; *Niboyet v. Niboyet*, 4 P. D. 1, 17, judgment of Brett, L.J.

(t) *Simonin v. Mallac*, 2 Sw. & Tr. 67, 29 L. J. (P. & M.) 97.

CHAPTER VI.

GENERAL PRINCIPLES AS TO RIGHTS OVER
MOVEABLES (a).

Rule 49.
Whether
thing im-
moveable
deter-
mined by
lex situs.

RULE 49.—The law of the country where a thing is situated (*lex situs*) determines whether it is to be considered as a moveable or an immoveable (b).

A law may determine that a thing in its nature moveable shall be for some or for all purposes subject to the rules usually applicable to immoveables, or that a thing in its nature immoveable shall be for some or for all purposes subject to the laws usually applicable to moveables.

(a) See *Story*, ss. 376, 380—423*h*.

Westlake, s. 260—276.

1 *Felix*, pp. 184, 185.

Phillimore, ss. 565—592.

Wharton, ss. 297—372.

Savigny, ss. 360, 366—368, pp. 68, 129—148.

Bar, ss. 57—65.

(b) *Story*, s. 447.

McLaren, *Law of Scotland as to Wills and Succession*, s. 37.

Freke v. Lord Carbery, L. R. 16 Eq. 461.

In goods of Gentili, 9 Ir. L. R. Eq. 541.

Grimwood v. Bartels, 46 L. J. (Ch.) 788.

See *Savigny*, p. 136; *Guthrie's Note* (a); see *Downie v. Downie's Trustees*, 1866, 4 Macph. 1067.

The only law which can carry this determination into effect is the law of the place where the given piece of property is situated. This law, therefore, (*lex situs*) is the law by which this question is settled. Title deeds, for example, are in their nature moveables, but title deeds in England are treated as appurtenant to the land to which they relate. English courts further admit the right of other countries to determine whether property within their limits comes under the class of moveables or immoveables. When slavery existed in Jamaica, the slaves on the estate were reckoned appurtenant to the land, and have been held by our courts to pass under a devise of the realty in Jamaica (c).

RULE 50.—Rights over moveables are in many cases determined by the law of the owner's domicile (*lex domicilii*) (d).

Rule 50.

Rights
over
moveables
depend on
lex domicilii.

“It is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession. For instance, if a

(c) *Ex parte Rucker*, 3 Dea. & Ch. 704.

(d) *Sill v. Worswick*, 1 Hy. Bl. 665.

Birtwhistle v. Vardill, 5 B. & C. 438, 451, 452.

Potter v. Brown, 5 East. 124.

Phillips v. Hunter, 2 Hy. B. 402, 505.

In re Ewin, 1 C. & J. 151.

In re Winter, 30 L. J. (P. & M.) 56.

"foreigner having property in the funds here dies, that "property is claimed according to the right of representation given by the law of his own country" (e).

"It is clear, from the authority of *Bruce v. Bruce* (f), and "the case of *Somerville v. Somerville*, that the rule is that "personal property follows the person, and it is not in any "respect to be regulated by the *situs*; and if, in any "instances, the *situs* has been adopted as a rule by which "the property is to be governed, and the *lex loci rei sitæ* "resorted to, it has been improperly done. Wherever "the domicile of the proprietor is, there the property is to "be considered as situate" (g).

These dicta express one of the principles maintained by our courts with regard to rights over moveables. Moveable property is for many, though not for all, purposes governed by the law of the country where the owner is at a given moment domiciled, and not by the law of the country where the property may be actually situated, or the owner may be residing. D., a person domiciled in France, dies in London intestate. He has in London household furniture and money at a bank. The distribution of such property is regulated not by the law of England, but by the law of France applicable to a person in D.'s position (h).

Rule 51.

Rights
over in-
dividual
moveables
deter-
mined
by *lex*
situs.

RULE 51.—Rights over individual moveables are determined by the law of the country where the moveable is situated (*lex situs*) at the time

(e) *Sill v. Worswick*, 1 Hy. Bl. 665, 690, per Lord Loughborough. *Conf. Birtchistle v. Vardill*, 5 B. & C. 438, 451. In the earlier cases "personal property" is used as synonymous with moveables. See, as to the distinction, pp. 37—39, *ante*.

(f) 2 B. & P. 229 (n).

(g) *In re Ewin*, 1 C. & J. 151, 156, per Bayley, B. See, however, as to the influence in modern times of the *lex situs*, pp. 247—249, *post*.

(h) See Rule 66, p. 291, *post*; and see Rule 51, p. 246, *post*; Rule 55, p. 255, *post*; Rule 57, p. 262, *post*, as to the effect upon rights over moveables of the *lex situs*.

when the transaction takes place in which the right originates (*k*).

From expressions used in earlier cases (*l*), it might be inferred that our courts hold that rights over moveables ought to be determined wholly by the law of the owner's domicile. English tribunals have, however, never held rigidly to this view, and have at all times given considerable weight, as regards, for example, sales and gifts of goods, to the *lex situs* (*m*). "Thus, a merchant domiciled in "America may doubtless transfer his personal property "according to the law of his domicile, wherever the property "may be. But if he should direct a sale of it or make a "sale of it in a foreign country, where it is situate at the "time, according to the laws thereof, either in person or "by an agent, the validity of such a sale would scarcely be "doubted. If a merchant is temporarily abroad, he is "understood to possess a general authority to transfer such "personal property as accompanies his person wherever he "may be ; so always that he does not violate the law of the "country where the act is done (*n*). The general convenience and freedom of commerce require this enlargement of the rule ; for otherwise the sale of personal "property actually situate in a foreign country, and made "according to the forms prescribed by its laws, might be "declared null and void in the country of the domicile of "the owner. In the ordinary course of trade with foreign "countries, no one thinks of transferring personal property "according to the forms of his own domicile ; but it is trans-

Effect
given to
lex situs,
as well as
to *lex*
domicilii.

(*k*) See *Westlake*, s. 264.

1 *Fozzia*, p. 134.

Story, s. 384.

Bar, ss. 57, 58.

See expressions of *Blackburn, J.*, in *Santos v. Mudge*, 29 L. J. (C. P.) 348, 351, 8 C. B. N. S. 861, 871 (Ex. Ch.)

(*l*) See pp. 245, 246, *ante*.

(*m*) As to meaning of *lex situs* and *lex domicilii*, see p. 36, *ante*.

(*n*) See 1 *Kames on Equity*, B. 3 Ch. 8, s. 8.

"ferred according to the forms prescribed by the law of the "place where the sale takes place" (*o*).

It may further be added that English courts, though still in theory admitting the effect of the *lex domicilii*, show every day a stronger tendency to hold that the validity of every transfer of rights over individual moveables depends mainly on the law of the place where the article of property is situated at the time of the assignment (*p*). The peculiarity in short of the present state of English law is that the courts in determining rights over moveables give a certain effect to each of the two different principles; first, that the assignment of a moveable is governed by the law of the owner's domicil (*lex domicilii*); and, secondly, that the assignment of a moveable may be valid which is made in accordance with the law of the place where the moveable is situated at the time of the assignment (*lex situs*). The acknowledgment of these two different principles leads to considerable perplexity. The result, however, of the conflict between what are really two different theories leads, as already pointed out (*q*), to the following results:

Results of
combined
effect of
lex situs
and *lex*
domicilii.

First.—The capacity to assign moveables depends in general upon the law of the country where the owner is domiciled (*r*). When, however, moveables are assigned individually, as by sale or gift, a person's capacity to make, *e.g.*, a valid sale, constantly depends on the law of the place where the moveable sold is situated (*lex situs*) (*s*).

(*o*) *Story*, s. 384.

(*p*) See *Cammell v. Sewell*, 5 H. & N. 728, 29 L. J. (Ex.) 350, (Ex. Ch.), 3 H. & N. 617, 27 L. J. (Ex.) 447.

(*q*) See pp. 156, 157, *ante*.

(*r*) This is merely an application of the principle that capacity or *status* is governed by the *lex domicilii*. See Rule 25, p. 163, *ante*.

(*s*) See, as to alienation by an infant, Rule 32, p. 179, *ante*. In general the law of the country where a sale takes place (*lex actus*) is the same as the law of the country where the thing sold is situated. It deserves, however, consideration how far a sale is to be held valid which is not in accordance either with the owner's *lex domicilii*, *e.g.*, England, or with the law of the country where the thing sold is situated (*lex situs*), *e.g.*, France, but which is in accordance with the law of the country where the sale takes place (*lex actus*), *e.g.*, Prussia. See, also, as to questions arising as to the effect of the *lex actus*, pp. 251—253, *post*.

Secondly.—Individual assignments of moveables, *e.g.*, by gift or sale, are, as regards modes or forms of alienation, mainly governed by the *lex situs* (*t*), though an assignment in accordance with the owner's *lex domicilii* may also be valid (*u*).

Lastly.—General assignments of moveables in which property is transferred as a whole, as in consequence of bankruptcy, marriage, or death, are governed almost entirely by the *lex domicilii* of the person whose rights are assigned (*x*).

RULE 52.—A right to a moveable once duly acquired is not lost by a change in the situation of the moveable (*y*).

Rule 52.
Right to
moveable
acquired,
not lost
by change
of situa-
tion.

A title to goods acquired under the law of one country is generally held valid by the courts of other countries. Thus, if the goods of an Englishman are stolen in France and sold by the thief in Paris under circumstances which give the purchaser a good title according to French law, his right to the goods, should he bring them into England, will in general be recognised by our courts, even should the circumstances of the purchase not be such as would, if the transaction had taken place in England, have given a good title to the goods (*z*).

(*t*) See Rules 55—57, pp. 255—264, *post*.

(*u*) Rule 54, p. 258, *post*.

(*x*) See Rule 59, p. 266, *post*.

(*y*) See *Cammell v. Sewell*, 5 H. & N. 728, 27 L. J. (Ex.) 447, 29 L. J. (Ex.) 350 (Ex. Ch.). See, *contra*, the *Eliza Cornish* or *Segredo*, 1 Ecc. & Ad. 36, which, however, must, it is conceived, be now looked upon as wrongly decided.

(*z*) See, on this point, *Cammell v. Sewell*, 5 H. & N. 728, 29 L. J. (Ex.) 350. See, as to the general principle, *Bar*, s. 64.

CHAPTER VII.

INDIVIDUAL ASSIGNMENT OF MOVEABLES (a).

Rule 53. **RULE 53.**—An assignment of a moveable in accordance both with the law of the owner's domicil (*lex domicilii*) and with the law of the country where the moveable is situated (*lex situs*) is valid.

Assign-
ment in
accordance
both with
lex domi-
cilii and
with *lex*
situs valid.

The question generally discussed by writers on the conflict of laws is, whether it is the owner's *lex domicilii* or the *lex situs* (b) which governs the assignment of a moveable. The rule, therefore, that an assignment in accordance with both of these laws is valid, may appear hardly to require statement. It, however, both covers a great number of assignments, since goods are constantly sold under such circumstances that the *lex domicilii* and the *lex situs* are one and the same, and also suggests points of some difficulty as to the effect to be given to the *lex actus* or law of the country where the assignment, whether by gift or sale, takes place.

D., a tradesman domiciled in England, sells goods in his shop in London to A. The sale, being in accord-

(a) *Story*, ss. 374—393.

Westlake, ss. 260—275.

Phillimore, ss. 581—592.

Wharton, ss. 297—358.

Savigny, ss. 366—368, pp. 129—136.

Bar, ss. 57—65.

(b) See, for meaning of terms, pp. 35, 36, *ante*.

ance with the ordinary rules of English law, is in accordance both with the *lex domicilii* and the *lex situs*, and valid (c).

Effect of lex actus.—It appears to be generally assumed (d) that an assignment of moveables is governed as to formalities and effect either by the *lex domicilii* of the owner or the *lex situs*, and sufficient attention has, perhaps, not been given, at least by writers, to the possible effect of the *lex actus*, yet cases may easily be imagined where the *lex actus* differs both from the *lex domicilii* and from the *lex situs* (e). The question which may in such instances arise is, in general terms, whether an assignment of goods not in accordance with the *lex actus* is to be held valid? The answer to this inquiry may probably, we may conjecture, be different according to the nature of the transaction under which the assignment takes place. If this transaction, *e.g.*, a gift, leave neither party under a contractual obligation to the other, the validity of the assignment will, perhaps, not be affected by the *lex actus*. If it leaves either party under such obligation then the validity of the assignment may be affected by the *lex actus*.

Is assignment valid if not according to *lex actus*?

When, therefore, the assignment is by gift, or is the result of a contract fully executed on both sides, we may, with some probability, conclude that, being made in accordance with the law of both the owner's domicil and of the country where the goods are situated, it will be held valid here.

Assignment by gift or under fully executed contract.

D., domiciled in England, but resident in Scot-

(c) See as to the sale of ships at sea, *Schultz v. Robinson*, 24 D. 120 (Scotch), and the American cases, *Thuret v. Jenkins*, 7 Martin, 318; *Southern Bank v. Wood*, 14 Louia. Ann. 556 (1859). The objection in *Simpson v. Fogo*, 1 J. & H. 18, to the Louisiana judgment was the refusal of the court to recognise the validity of an assignment of an English ship, which was good according to the law both of the *situs* and of the owner's domicil (*lex domicilii*), and of the country where the contract was made (*lex loci contractus*).

(d) See and compare *Simpson v. Fogo*, 32 L. J. (Ch.) 249, 251, judgment of Page Wood, V.C.; *Westlake*, ss. 260—272; *Savigny*, ss. 366, 367, pp. 129, 136.

(e) See p. 248, note (s), *ante*.

land (e), when at Edinburgh gives to A. by deed, or sells to A. for ready-money, the furniture of D.'s house in London. The gift or sale being in accordance with English law is (it is conceived) valid, and passes the ownership of the goods to D., without any reference to what may be the law of Scotland (*lex actus*).

D., domiciled in Sweden, but resident in England, is owner of specific goods in a warehouse at Stockholm. D., when in London, makes a gift of the goods to A. by word of mouth. D. then brings them to London and sells them to B. Assuming, for the sake of illustration, that a verbal gift is according to Swedish law sufficient to transfer the ownership of the goods to A., can A. sue D. here for the value of the goods? In principle the answer ought to be that A. acquired a good title to the goods by the gift of D., and is able to sue him for their value. Whether our courts would give this answer admits of doubt, for they may hold that the forms of a gift, no less than of a contract, are governed by the *lex actus* (f).

Assign-
ment un-
der con-
tract not
fully exe-
cuted.

When the assignment results from a contract not fully executed on both sides the assignment is probably not valid unless it is made according to the forms required by the *lex actus*, i.e., the forms required by the law of the place where the contract is made (*lex loci contractus*) (g).

D. is domiciled in France, and has specific goods of the value of £100 in a warehouse at Paris. He, when in London, sells them there to A. by word of mouth, without any memorandum in writing or other circumstance to satisfy the Statute of Frauds. D. then brings the goods to England and sells them to B. Can A., assuming that the property passes under the law of France (h), sue D. here for their value? Probably he cannot, and this not only because the

(e) See, as to the law of Scotland requiring delivery in order to pass the property in goods, whilst the law of England does not, *Savigny*, p. 188, note (1) by *Guthrie*.

(f) Such a gift would not under English law transfer the ownership of goods in England to A. *Irons v. Smallpiece*, 3 B. & Ald. 551.

(g) See p. 151, *ante*.

(h) See *Code Civil*, Art. 1138.

17th section of the Statute of Frauds may affect procedure, but also because the contract which leaves A. under an obligation to pay for the goods is not in accordance with the *lex loci contractus*, and is invalid. This conclusion, even if correct, does not absolutely contravene Rule 53. The reason why an assignment, good according both to the *lex situs* and to the *lex domicilii*, may, in this case, as in similar instances, be invalid is, that it is one the validity of which cannot be separated from the validity of a contract, and that the form of a contract is, according to the view of our courts, admittedly governed by the law of the place where the contract is made (*lex actus*) (*f*).

RULE 54.—Subject to the exception hereinafter mentioned and to the effect of Rule 57 (*g*), the assignment of a moveable, wherever situated, in accordance with the law of the owner's domicile is valid (*h*).

Rule 54.

Assign-
ment in
accordance
with
owner's
lex domici-
cilii valid.

"The general rule is, that a transfer of personal property, "good by the law of the owner's domicile, is valid wherever "else the property may be situate" (*h*). No reported case can (it is believed) be cited as absolutely supporting this rule (*i*), in reference to individual assignments, *e.g.*, by gift or sale, but the validity of such assignments, when made in accordance with the owner's *lex domicilii*, is so uniformly taken for granted by judges and by writers of eminence, such as Story, that we may assume that a sale or gift by a person domiciled in England will, at any rate if made in England, be held (if it be in accordance with English law) to be valid as regards goods wherever situated. Whether the rule will apply to all other cases admits of doubt.

D., for example, domiciled and being in England, makes

(*f*) Pp. 151, 152, *ante*.

(*g*) See p. 262, *post*.

(*h*) See Story, n. 384.

(*i*) The cases which may be cited refer to general assignments, *e.g.*, in case of death, as to which the application of the rule is undoubted.

a gift by deed to A. of goods at Paris. The gift is valid here without reference to French law (*k*). If D. were to bring the goods into England, no third person (*l*) having acquired a title to them under French law, the goods would be held to be the property of A.

The same result ought (it would seem) to follow if D., when domiciled in England, but being in France, makes a gift by deed to A. of goods lying in France. In such a case, however, our courts would possibly hold that the form required by the *lex loci* was imperative, and that, therefore, if the gift does not, by the law of France, pass the property in the goods, there has been no transfer of property at all (*m*).

D., again, domiciled and being in a foreign country, where property in goods can be conveyed by a verbal gift, gives A., by word of mouth, furniture of D.'s in London. The property (perhaps) passes to A.

This, however, is doubtful. The question remains open how far the principle of the following exception does not apply to the last supposed case:—

Transfer
not valid
where
lex situs
requires
special
form.

Exception.—When the law of the country where a moveable is situated (*lex situs*) prescribes a special form of transfer, an assignment according to the law of the owner's domicile (*lex domicilii*) is not valid (*n*).

The law of the owner's domicile does not determine the validity of a transfer of moveables if “there is some positive “or customary law of the country where they are situate, “providing for special cases (as is sometimes done), or, from “the nature of the particular property, it has a necessarily “implied locality” (*n*). Among the latter class have been

(*k*) See *Code Civil*, Art. 931.

(*l*) This limitation must probably be added in accordance with Rules 55—57, pp. 255—264, *post*. See *Castrique v. Imrie*, L. R. 4 H. L. 414; *Cammell v. Sewell*, 5 H. & N. 728; *Stringer v. English Ins. Coy.*, L. R. 5 Q. B. 599.

(*m*) The observations as to the effect of the *lex actus*, pp. 251—253, *ante* apply, of course, to Rule 54, no less than to Rule 53.

(*n*) *Story*, s. 383. See *Robinson v. Bland*, 2 Burr. 1079, 1 W. Bl. 234, 246; *Westlake*, s. 271.

placed contracts respecting public funds or stock, the local nature of which requires them to be carried into execution according to the local law. No positive transfer can be made of such property except in the manner prescribed by the local regulations (*o*).

RULE 55.—An assignment of a moveable giving a good title according to the law of the country where the moveable is situated (*lex situs*) at the time of the assignment is valid (*p*).

Rule 55.
Assign-
ment in
accordance
with *lex*
situs valid.

Though an assignment of a moveable in accordance with the owner's *lex domicilii* is in general valid, "it does not follow that a transfer" [of a thing] "made by the owner, according to the law of the place of its actual *situs*, would not as completely divest his title" (*q*); and if a moveable "is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere" (*r*). The principle "that 'if personal property is disposed of in a manner binding according to the law of the country where it is [*lex situs*], that 'disposition is binding everywhere' . . . as a general rule, is correct, though no doubt it may be open to exceptions and qualifications" (*s*).

D., a merchant domiciled in England, purchased a cargo of wood in Russia, whence it was shipped for England on board a Prussian vessel. The ship was shipwrecked on the coast of Norway, but the cargo was saved, and might have been re-shipped to England. The captain, having authority to do so under the law of Norway (*t*) but not under the law

(*o*) *Ibid*.

(*p*) See *Cammell v. Sewell*, 5 H. & N. 728, 29 L. J. (Ex.) 350 (Ex. Ch.), 27 L. J. (Ex.) 447, 3 H. & N. 617.

(*q*) *Story*, n. 384. See pp. 247, 248, *ante*.

(*r*) See *Cammell v. Sewell*, 5 H. & N. 728, 744.

(*s*) *Castrique v. Imrie*, L. R. 4 H. L. 414, 429, opinion of Blackburn, J. delivered to House of Lords.

(*t*) i.e., he could under Norwegian law give a good title to a *bond fide* purchaser, though responsible to the owners if he sold improperly.

of England, sold the cargo to M., who, under Norwegian law, acquired a good title. He re-sold the wood to X., who brought it to England. Whilst the goods were in the hands of M. an attempt was made to set aside the sale in a Norwegian court. This attempt failed. D. (or more accurately, persons representing D.'s interest) brought an action against X. The Court of Exchequer held that the action would not lie, as the title to the goods had been decided by a Norwegian court (*t*). The Court of Exchequer Chamber also held that the action was not maintainable on the wider ground, that if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere (*u*). The case is the stronger as an authority, because the goods were brought accidentally, and not by the will of the owner, within the jurisdiction of Norwegian law, and because the Court of Exchequer Chamber contemplated the different cases in which the principle might apply. "Many cases," the court laid down, "were mentioned in the course of the argument, and more might be collected, in which it might seem hard that the goods of foreigners should be dealt with according to the laws of our own or of other countries. Amongst others our law as to the seizure of a foreigner's goods for rent due from a tenant, or as to the title gained in them, if stolen, by a sale in market overt, might appear harsh. But we cannot think that the goods of foreigners would be protected against such laws, or that if the property once passed by virtue of them it would again be changed by being taken by the new owner into the foreigner's own country. We think that the law on this subject was correctly stated by the Lord Chief Baron in the course of the argument in the court below, where he says, 'if personal property is disposed of in a manner binding according to the law of the

(*t*) See 3 H. & N. 645, 646, judgment of court delivered by *Martin, J.*

(*u*) See 5 H. & N. 744, 745. The case would be quite decisive were it not mixed up with the question as to the effect of a judgment.

“ ‘country where it is, that disposition is binding every-
 “ ‘where.’ And we do not think that it makes any
 “ difference that the goods were wrecked, and not intended
 “ to be sent to the country where they were sold. We do
 “ not think that the goods which were wrecked here would
 “ on that account be the less liable to our laws as to market
 “ overt, or as to the landlord’s right of distress, because
 “ the owner did not foresee that they would come to
 “ England.”

“ Very little authority on the direct question before us
 “ has been brought to our notice. The only case which
 “ seems at variance with the principles we have enunciated
 “ is the case of the ‘*Eliza Cornish* or *Segredo*,’ before the
 “ judge of the Court of Admiralty (x). If this can be an
 “ authority for the proposition that a law of a foreign
 “ country of the nature of the law of Norway, as proved in
 “ the present case, is not to be regarded by the courts of
 “ this country, and that its effect as to passing property in
 “ the foreign country is to be disregarded, we cannot agree
 “ with the decision; and, with all the respect due to so
 “ high an authority in mercantile transactions, we do not
 “ feel ourselves bound by it when sitting in a court of error.
 “ We must remark also, that in the case of *Freeman* v.
 “ *The East India Company* (y), the Court of Queen’s Bench
 “ appear to have assented to the proposition that the Dutch
 “ law, as to market overt, might have had the effect of
 “ passing the property in such case if the circumstances of
 “ the knowledge of the transaction had not taken the case
 “ out of the provisions of such law” (z).

The case of *Cammell* v. *Sewell* has been followed by
 decisions that a title to goods given by the decree of a
 foreign court having control over the goods is valid against
 the claim of an English owner (a). These decisions are

(x) 1 Eccl. & Adm. 36.

(y) 5 B. & Ald. 617.

(z) *Cammell* v. *Sewell*, 5 H. & N. 728, 744, 745, per Crompton, J.

(a) *Castrigue* v. *Imrie*, L. R. 4 H. L. 414.

See *Liverpool Marine Co. v. Hunter*, L. R. 4 Eq. 62.

not conclusive, since they may be explained as depending on the weight to be given to a foreign judgment (*b*), but they are far more naturally regarded as applications of the principle enunciated in *Cammell v. Sewell* (*c*), and stated in the rule under consideration. When it is noticed that the principle of this rule is approved by almost all jurists, is adopted, to a great extent, by the courts of continental nations, is supported by some American cases, and is not opposed to any reported English decision, the conjecture may be hazarded with some confidence that it will ultimately be adopted in its full extent by our courts.

D. is domiciled in France. His watch is stolen in London by M., and sold in market overt to X. X. acquires a good title against D., even if D. shows that a sale in market overt does not give a good title according to law of France.

D. is domiciled in Germany, but is residing in lodgings in London. His goods are seized by the superior landlord, under a distress for rent due from the lodginghouse-keeper. The goods are sold to X. X., whatever the law of Germany, has a good title to the goods as against D.

D. is domiciled in England. His ship is wrecked on the coast of Norway. The cargo is sold, wrongfully according to English law, by M., the captain, to X., who acquires a good title according to Norwegian law. X. brings the goods to England. X. has a good title here to the goods against D. (*d*).

Rule 56.

Judgment
in rem by
competent
court gives
title to
moveable.

RULE 56.—Subject to the exception herein-after mentioned, a judgment *in rem* in respect of the title to a moveable by a foreign court of competent jurisdiction having power to deal with the moveable, gives a valid title to the moveable (*e*).

(b) See Rule 56, *post*.

(c) 5 H. & N. 728, 29 L. J. (Ex.) 350 (Ex. Ch.).

(d) See for these cases *Cammell v. Sewell*, 5 H. & N. 728.

(e) *Castrique v. Imrie*, L. R. 4 H. L. 414.

Stringer v. English, &c., Insurance Co., L. R. 5 Q. B. 599 (Ex. Ch.), L. R. 4 Q. B. 676.

Where moveable property is within the actual control of a court of competent jurisdiction, "whatever the court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign courts of admiralty, whether they are causes of prize, or of bottomry, or of salvage, or of forfeiture . . . or of any the like nature over which such courts have a rightful jurisdiction, founded on the actual or constructive possession of the subject-matter" (f).

"We may observe that the words as to an action being *in rem* or *in personam*, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from *Story*. We think the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the state under the authority of which the court sits; and, secondly, whether the sovereign authority of that state has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world" (g).

The real principle of a judgment *in rem* is "that a person who acquires a valid title by the law of any country either to a chattel or to realty shall be deemed

Contrast *Simpson v. Fogo*, 29 L. J. (Ch.) 657, 32 L. J. (Ch.) 29, 1 J. & H. 18, 1 H. & M. 195. See 2 S. L. C. (7th ed.), pp. 773, 785—788; *Geyer v. Aguilar*, 7 T. R. 681; *Hart v. Macnamara*, 4 Price, 154 n.

(f) See *Story*, s. 592, cited with approval by *Blackburn, J.*; *Castrique v. Imrie*, L. R. 4 H. L. 414, 428, 429.

(g) *Castrique v. Imrie*, L. R. 4 H. L. 414, 429, per *Blackburn, J.*

"all over the world to be owner of such chattel or realty. "If, therefore, the court has absolutely the disposal of the "res, and it is in its power, as it is in the case of a judgment *in rem* in the Admiralty Court, it does not matter "who is owner; all the courts assume that the thing "has been fairly litigated, that the man brought before "the court is owner, and had such an interest as entitled "him to raise the contest, and that the judgment *in rem* "bound the whole" (h). In other words, the rule as to the effect of a judgment *in rem* is, if Rule 55 (i) can be maintained to its full extent, merely an application of that Rule.

"In the case of *Cammell v. Sewell* (k) a more general "principle was laid down, viz., that 'if personal property "'is disposed of in a manner binding according to the law "'of the country where it is, that disposition is binding "'everywhere.' This, we think, as a general rule, is correct, "though no doubt it may be open to exceptions and "qualifications; and it may very well be said that the "rule commonly expressed by English lawyers, that a judgment *in rem* is binding everywhere, is in truth but a "branch of that more general principle" (l).

The rule, however, as to the effect of a judgment *in rem*, rests on better authority than the general principle of which it is a legitimate application. A British ship belonging to a British subject domiciled in England was, when in a French port, sold under the judgment of a French court of competent jurisdiction. The court gave judgment under a mistaken view of English law. It was, nevertheless, held by the House of Lords, that the title of the purchaser could not, on the ship arriving here, be impeached by the original owner, though he might, under English

(h) *Simpson v. Fogo*, 32 L. J. (Ch.) 249, 256, judgment of Wood, V.C.

(i) See p. 255, *ante*.

(k) 5 H. & N. 728, 746.

(l) *Castrique v. Imrie*, L. R. 4 H. L. 414, 429, *per Blackburn, J.*

law, but for the judgment of the French court, have had a better title than the purchaser (m).

"Assuming," it was laid down, "that there was a mistake of the law, still this error will not render the French judgment void in this country. Even if evidence had been offered to the French courts of the English law applicable to the case, and they had honestly come to an erroneous conclusion upon the subject, their judgment could not be impeached in our courts.

"To sum up my opinion in the words of Mr. Justice *Blackburn* . . . I think the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the state under the authority of which the court sits; and, secondly, whether the sovereign authority of that state has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against "all the world" (n).

D., domiciled in England, sells a ship whilst at sea to A., also domiciled in England, who thereby, according to English law, becomes owner of the ship. The ship is seized at Havre by a creditor of D.'s. A French court, under a misapprehension of English law, conceiving D. still to be owner, orders the ship to be sold to satisfy the claim against D. The ship is bought by X., also an English subject, and brought by him to England. X. has, in virtue of the French judgment, a good title to the ship in England (o).

A British ship is seized as prize by a Russian vessel, on the ground of attempted breach of blockade, and taken to a Russian port for adjudication as prize by a prize court. The goods on board the ship are sold under the order of the court to X. It is ultimately decided by the prize court

(m) *Castrique v. Imrie*, L. R. 4 H. L. 414.

(n) *Ibid.*, 448, per Lord *Chelmsford*.

(o) *Ibid.*, 414.

that the ship was not lawfully captured. The title of X., the purchaser, to the goods is valid against that of A., the original owner (*p*).

Refusal of court to recognise title under other law. *Exception.*—Where the court delivering the judgment wilfully refuses to recognise the law of other nations, the title given by the judgment is not valid (*†*) (*q*).

D., domiciled in England, mortgages a ship lying at Liverpool to A. The ship is seized at New Orleans under a judgment against D. A., as being, under English law, the owner of the ship, opposes the sale of the ship before the Louisiana courts. These courts order the ship to be sold for the benefit of D.'s creditor, on the ground that they refuse to recognise the right acquired by A. in England to the ship, because it was not acquired in such a manner as to be valid by the law of Louisiana. The ship is purchased by X. A. and not X. is, in England, the owner of the ship, *i.e.*, X. has not in England a good title to the ship against A. (*r*).

Rule 57.

Title under *lex situs* superior to title under *lex domicilii*.

RULE 57.—Where there is a conflict between a title under the law of the country where a moveable is situated (*lex situs*) and under the law of the owner's domicile (*lex domicilii*), the *lex situs* will in general prevail, *i.e.*, the title under the *lex situs* will be held the better (*s*).

(*p*) See, as to the principle of this case, *Stringer v. English, &c., Insurance Co.*, L. R. 5 Q. B. 599, and especially judgment of *Martin*, B. *Ibid.*, 606.

(*q*) *Simpson v. Fogo*, 32 L. J. (Ch.) 249.

(*r*) This is in effect the case of *Simpson v. Fogo*, 29 L. J. (Ch.) 657, 32 L. J. (Ch.) 249. The ground of the decision is, it should be remarked, that the Louisiana tribunals refused to recognise rights acquired under English law. To give, therefore, effect to their judgment would have been (it might be argued) to ratify the violation of the very principle (*viz.*, the recognition of rights acquired under the law of foreign countries) under which their judgment had a claim to recognition. See *Forsyth, Cases and Opinions on Constitutional Law*, p. 242.

But the decision in *Simpson v. Fogo* is open to doubt. See *Liverpool Marine Co. v. Hunter*, L. R. 4 Eq. 62.

(*s*) See *Cammell v. Sewell*, 5 H. & N. 723, 29 L. J. (Ex.) 350 (Ex. Ch.); *Castrique v. Imrie*, L. R. 4 H. L. 414.

When the matter in dispute between A. and X. is, which of the two is to be considered owner of a given chattel, it is impossible (t) to apply the *lex domicilii* of the owner without assuming the very point at issue, viz., which of the two is owner. A., for example, claims to be owner of a ship as purchaser under the judgment of a French court. X. claims to be owner, on the ground that he was owner of the ship under English law before the judgment was given, and that, the judgment being given under a mistake of English law, he is under that law owner still. If you apply the English law because it is the law of the country where the owner is domiciled, it is assumed that A. is owner, and whether he be so or not is the very question raised. Practically English courts have met this difficulty by tacitly deciding questions of disputed ownership in accordance with the law of the country where the goods were situated at the time when the transaction took place out of which the dispute arises. Thus, the goods of D., a foreigner domiciled abroad, are sold in England to A. under a distress. English courts hold the sale valid, even though the right of a landlord to sell the goods of a stranger under a distress for rent is unknown to the law of the country where D. is domiciled (*lex domicilii*) (u). Though, however, any sale of goods is apparently held valid here which, as a matter of fact, is valid by the *lex situs*, the importance still attached by our courts to the *lex domicilii* prevents them (it would seem) from holding a sale in accordance with the owner's *lex domicilii* invalid, because it would be invalid by the *lex situs*. Thus, it may (it is submitted) be assumed that a sale in England by D. there domiciled, to A. of goods in a warehouse in Scotland would be held in our courts, as between D. and A., to pass the property in the goods, even though by Scotch law it would not do so without delivery. If, however, X. should in Scotland, under a subsequent sale by D., obtain delivery of the

(t) *Savigny*, s. 366, pp. 129—136.

Bar, s. 58.

(u) See *Cammell v. Sewell*, 5 H. & N. 728, 29 L. J. (Ex. 350).

goods, the view of our courts would (it is submitted) be as follows: They would probably assume that Scotch law would recognise the sale to A., and, therefore, in the absence of clear proof to the contrary, consider A.'s title superior to that of X., but if it should be proved, *e.g.*, by a judgment of the Scotch courts, that X. was held to be the owner by the *lex situs*, X.'s title would probably be held here superior to that of A. (x).

Rule 58.

Assign-
ment of
debt.

RULE 58.—The assignment of a debt is regulated by the law of the creditor's domicile (*lex domicilii*) (?) (y).

The rules as to the assignment by a creditor of a debt (z) due to him from his debtor to a third party, the assignee, differ under the laws of different countries. The debt may be contracted in one country and assigned in another, while the creditor, the assignee, and the debtor may be domiciled in different countries. The question therefore arises by what law is the effect of assignment in one country, *e.g.*, in England, of a debt contracted in another country, *e.g.*, Scotland or France, to be determined. Story's view, which

(x) This appears to follow logically from the cases of, *e.g.*, *Cammell v. Sewell*, 5 H. & N. 728, 29 L. J. (Ex.) 350; *Castrique v. Inrie*, L. R. 4 H. L. 414, in which a sale valid according to foreign law (*lex situs*) has been held to prevail against the otherwise indubitable title of the English owner. The case supposed is, no doubt, not unlike that of *Olivier v. Townes* (14 Martin 93), which has been the subject of endless comment; but the question whether the decision of the Louisiana courts in that case was right in principle is different from the question whether a title acquired under that decision would be held valid in England, and, further, the fact of the goods being in Louisiana at the time of the mortgage, which the Louisiana courts refused to recognise, distinguishes the case from that of *Simpson v. Fogo*, 32 L. J. (Ch.) 249.

(y) See *Story*, ss. 395—400b, especially s. 397.

Westlake, ss. 273, 274.

See *Milne v. Moreton* (Am.) 6 Binney 361, 369.

(z) The word "debt" is used ambiguously for either (1) the obligation of the debtor X. to A., or (2) the claim of the creditor A. against the debtor X. This is the meaning of the term when the assignment of debts is spoken of.

is, perhaps, that of our courts, apparently is, that, on the principle that the creditor's claim is to be held situated in the country where he is domiciled, the assignment must be governed by the law of the creditor's domicil; but Story's language is uncertain, and the point is one on which there exists great difference of opinion (*a*). The statement of the law made in the Rule must, therefore, be looked upon in the dearth of decisions as open to great doubt. The suggestion may be made that the effect of the assignment of a debt ought to be looked upon as a matter of contract, and be determined therefore by reference to the law under which the debt was incurred, or in other words the contract was made (*b*) (*lex loci contractus*). This no doubt may be, according to circumstances, the law either of the creditor's or of the debtor's domicil, but it may also be the law of some country, *e.g.*, of the place fixed for the payment of the debt, which is not the domicil of either party. If this suggestion be sound, the effect of the assignment of a debt is not a matter dependent on the law of domicil, though it may, in fact, often be determined by reference to the law of the country where one of the parties is domiciled.

(*a*) See *Wharton*, ss. 359, 368.

(*b*) Compare *Savigny*, s. 372, p. 175.

CHAPTER VIII.

GENERAL ASSIGNMENTS OF MOVEABLES.

*General Principle.***Rule 59.**

General
assign-
ments of
moveables
regulated
by law of
owner's
domicil.

RULE 59.—The assignment of a person's moveables (as a whole) in consequence of

- (1) marriage (*b*), or
- (2) bankruptcy (*c*), or
- (3) death (*d*)

- | | |
|---------------------------------------|--|
| (<i>b</i>) <i>As to marriage.</i> | <i>Story</i> , ss. 143—199. <i>Phillimore</i> , ss. 440—485. <i>Wharton</i> , ss. 187—201. <i>Westlake</i> , ss. 366—373. <i>Savigny</i> , s. 379, pp. 240—248. <i>Bar</i> , ss. 94, 96. 1 <i>Felix</i> , pp. 207—216. |
| (<i>c</i>) <i>As to bankruptcy.</i> | <i>Story</i> , ss. 408—423 <i>f</i> . <i>Westlake</i> , ss. 277—289. <i>Phillimore</i> , ss. 765—779. <i>Wharton</i> , ss. 840—852. See 2 <i>Bell's Comma. (Maclaren's Ed.)</i> , pp. 375—381, 568—575. <i>Story</i> , ss. 480—482 <i>a</i> , 491 <i>a</i> , 491 <i>c</i> . <i>Westlake</i> , ss. 314—322. <i>Phillimore</i> , ss. 874—878. |
| (<i>d</i>) <i>As to death.</i> | <i>Wharton</i> , ss. 548—567. |
| (i) <i>Intestate succession.</i> | 1 <i>Felix</i> , pp. 130—136. <i>Bar</i> , s. 107. See 2 <i>Williams' Executors</i> (6th Ed.), pp. 1401—1409. <i>Savigny</i> , s. 377, pp. 232—235. <i>Story</i> , ss. 464—479 <i>o</i> . <i>Westlake</i> , ss. 323—332. <i>Phillimore</i> , ss. 858—878. |
| (ii) <i>Testamentary succession.</i> | <i>Wharton</i> , ss. 468—568 <i>a</i> . <i>Bar</i> , ss. 108—114. 1 <i>Felix</i> , pp. 166, 182—184. 1 <i>Williams' Executors</i> (6th Ed.), pp. 351—360. See 1 <i>McLaren on Wills</i> , ss. 43—74. |

is (in general) regulated by the law of such person's domicile at the moment of the transaction or event causing the assignment.

In certain instances the whole of a person's moveable property, or in other words the whole of his rights over his goods and chattels, is collectively transferred or assigned (or at any rate affected) by some one transaction, *e.g.*, marriage, or by some one event, *e.g.*, death. Such a transfer is termed by English lawyers a general assignment (*e*).

The three general assignments known to our law are—

- (1) Assignment by marriage (*f*).
- (2) Assignment under bankruptcy (*g*).
- (3) Assignment by death (*h*).

Assignment by death may take place under circumstances of—

- (i) intestacy (*i*).
- (ii) testacy (*k*).

Each of these general assignments is, on the whole, though with considerable modifications, subject to the *lex domicilii* of the person whose property is assigned.

(*e*) See *Selkirk v. Davis*, 2 Rose 291, 317.

(*f*) Rules 60—61, pp. 268—276, *post*.

(*g*) Rules 63—65, pp. 277—290, *post*.

(*h*) Rules 66—72, pp. 291—316, *post*.

(*i*) Rules 66—67, pp. 291—294, *post*.

(*k*) Rules 68—71, pp. 294—312, *post*.

CHAPTER IX.

ASSIGNMENT OF MOVEABLES BY MARRIAGE.

Rule 60.

Rights of
husband
and wife
governed
in absence
of settle-
ment by
law of
husband's
domicil.

RULE 60 (l).—Where there is no marriage contract, or settlement, the mutual rights of husband and wife to each other's moveables, whether possessed at the time of the marriage or acquired afterwards, are (subject to the possible exception hereinafter mentioned) determined by the law of the husband's actual (or intended?) domicile at the time of the marriage without reference to the law of the country

- (1) where the marriage is celebrated, or
- (2) where the wife is domiciled before marriage.

This rule may be considered well established. No English decision can, it is true, be cited which directly establishes it. It is, however, in harmony with the tendency of decided cases, is not opposed to any doctrine laid down from the Bench, and commands the almost unanimous (*m*) consent of jurists (*n*). For "it is," writes

(*l*) *Steine's Case*, 1 Rose, 462, 481; *Selkrig v. Davis*, 2 Rose 291; *Story*, s. 184; *Westlake*, s. 366; *Phillimore*, ss. 476—479; *Savigny*, s. 379, pp. 240—247; 1 *Felix*, s. 90.

(*m*) *Story*, ss. 158, 159, appears to suggest that the effect of a marriage on property depends on the law of the place where the marriage is celebrated. This view, which is not countenanced by other writers, is hardly consistent with the language which he uses in ss. 186, 187. The expressions employed in ss. 158, 159, refer, it may be conjectured, to cases in which the place where the marriage is celebrated is also the place of the matrimonial domicile.

(*n*) They do not agree as to the theoretical grounds on which the rule is to be upheld. See for a statement of the different theories on the subject *Westlake*, ss. 366—370.

Westlake, "universally allowed that, when a marriage "takes place without settlement, the mutual rights of the "husband and wife in each other's moveable property, "whether owned at the time of the marriage or afterwards "acquired, are to be regulated by the law of the matrimonial domicile" (o).

The term "matrimonial domicile," used in this passage, means in general the actual domicile of the husband at the time of the marriage, but it may possibly sometimes, when persons marry with the avowed intention of immediately settling in some country where the husband is not actually domiciled, as where D. and M., domiciled in England, marry with the intention of at once emigrating to New York, mean not the actual but the intended domicile of the husband (p). Westlake's expressions, therefore, if the term matrimonial domicile be thus interpreted, exactly correspond with and bear out the rule under consideration (q). Even though some little doubt may be entertained whether our courts will ever look to the intended, rather than the actual, domicile of the husband as determining the law which regulates the rights of the parties to a marriage in respect of moveables, there can, it is conceived, be no doubt that English tribunals will not hold that these rights are to be determined with reference either to the law of the country where the marriage is celebrated, or to the law of the country where the wife was domiciled before marriage.

1. D., domiciled in England, marries in London M., a Frenchwoman domiciled in France. The rights of the parties to moveable property are regulated by the law of England, just as they would be if D. and M. were both domiciled in England.

(o) *Westlake*, s. 366, adding, "so long as that remains unchanged." Effect is given to these words by the introduction of the exception to the general rule, p. 270, *post*.

(p) See 1 *Bishop, Marriage and Divorce*, s. 404, and the American cases, *Laud v. Laud*, 1 S. & M. 99; *Carroll v. Renick*, *ibid.*, 798.

(q) Westlake's language leaves it uncertain whether he does or does not hold with the American courts that the matrimonial domicile may occasionally be the husband's intended domicile.

The result is as follows :—(i) D., subject to the provisions of the Married Woman's Property Act, 1870, 33 & 34 Vict. c. 93, becomes immediately possessed of all the goods and chattels of M. wherever situated in her possession, *e.g.*, to the money in her purse, or furniture in her house (*a*). (ii) D., subject as aforesaid, and also to M.'s equity to a settlement (*b*), becomes entitled to all M.'s *choses in action*, *e.g.*, debts due to her, on his reducing them into possession. (iii) M. acquires no right to any of the moveable property of D.

2. D., domiciled in England, marries in Switzerland M., a Frenchwoman domiciled in Italy. The rights of the parties to moveable property are regulated by the law of England.

3. D., domiciled in England, marries in France M., a Frenchwoman. M., after her marriage, inherits £1000. The right to the money is regulated by the law of England.

4. D., domiciled in France, marries M., a woman domiciled in England. The marriage takes place in London. The rights of D. over the moveable property of M., and of M. over the moveable property of D. respectively, are regulated by the law of France.

5. D., domiciled in England, marries M., a woman domiciled in France. It is the intention of both parties to go, immediately after the marriage, and settle in Scotland. This intention they forthwith carry out. Their rights over moveables are possibly to be determined by Scotch law (?).

Moveables
acquired
after
change of
domicil.

Exception.—Where the domicil of the parties is changed after marriage, the mutual rights of husband and wife over each other's subsequently acquired moveables are governed by the law of their domicil at the time of the acquisition (?).

Two different views exist as to the effect (in the absence of a marriage contract or settlement) of a change of domicil

(a) See, however, as to wife's paraphernalia, 1 *Williams' Executors*, (6th Ed.) p. 718—725.

(b) *Elbank v. Montolieu*, 1 Wh. & T. L. C. (5th ed.), p. 464.

after marriage on the rights over moveables of the husband and wife.

The prevailing view is, that the law of the husband's domicile at the time of the marriage supplies the rule by which the parties tacitly agreed or intended that their property relations as regards moveables should be regulated throughout life. On this view, a subsequent change of domicile in no way affects these relations. D. and M., domiciled in England, are there married. They afterwards become domiciled in France, where they make large gains in trade. Our courts, on the view now under consideration, would hold that the rights of the husband and wife respectively to such gains ought to be determined with reference to the rules, not of French, but of English law (g).

A different view has obtained currency in the United States. American courts, and writers of repute, hold that a change of domicile involves the intention to submit as to future acquisitions to the law of the new domicile, and hence that, "where married persons transfer their domicile to another state, their subsequent acquisitions in the latter state are governed by its laws, and not by the former laws" (r). On this view, the rights of the parties in the supposed case to the gains made after settlement in England would depend on French not on English law.

Which of these two views will be finally adopted by our courts is, it is conceived, fairly open to doubt. The validity, therefore, of the exception to Rule 60 must be considered an open question.

All writers, it should be noticed, appear to admit that a change of domicile does not affect the rights of husband

(g) See *Westlake*, s. 368, note (r).

(r) 2 *Bishop, Law of Married Women*, s. 569.

See 1 *Bishop, Marriage and Divorce*, s. 405.

Townes v. Durbin, 1 Met. Ky. 352 (Am.).

Stokes v. Machen, 32 Barb. 145 (Am.).

Beard v. Basye, 7 B. Mon. 133 (Am.).

King v. O'Brien, 33 N. Y. Sup. Ct. 49 (Am.).

or wife to property fully acquired by either of them under the law of their former domicil (s).

"If married persons remove from one jurisdiction to another, it is the teaching of adjudications the same as of legal reason, that they carry with them to the new jurisdiction those rights of property which the law of the old jurisdiction gave them when they left it. For example: if, where the common law prevails, a man and woman are married, and she has a purse of money in her pocket, or watch at her belt, this money or watch becomes the actual property of her husband, although it does not come otherwise into his possession. Then, if the parties remove to a state where the laws secure to the wife what was hers before marriage, the ownership in this property is not transferred back to her, but remains his in the new locality as it was in the old. This rule applies also to property of the wife acquired after marriage. If, by the law of the place, it vests in the husband, it remains his after the removal to a state whose laws secure the like property to the wife under corresponding circumstances" (t).

D., domiciled in England, marries M., a Frenchwoman domiciled in France. Whilst in England they make £2000 in trade. They afterwards acquire a domicil in France, and whilst there domiciled make £1000. The rights of D. and M. to the £2000 are governed by English law. But if the exception hold good, their respective rights over the £1000 are governed by French law.

Rule 61.

Where
there is a

RULE 61.—Where there is a marriage contract, or settlement, the terms of the contract, or settle-

(s) That this must be so results from Rule 23, p. 159, *ante*, which is itself merely an application of the still more general principle that the law of one civilised country, in general, recognises or gives effect to rights in fact acquired under the law of another country. See also Rule 52, p. 249, *ante*.

(t) 2 *Bishop, Law of Married Women*, s. 566, and see foregoing note. He raises a curious question as to the effect of change of domicil on a wife's *chose in action* not reduced into the husband's possession.

ment, determine the rights of husband and wife in respect of all present or future moveables to which it applies (*u*).

contract
rights of
parties are
deter-
mined
thereby.

Parties to a marriage contract may regulate their mutual rights to property on whatever terms they think fit, and our courts will, in general, enforce the terms which the parties have agreed upon. *D. and M.*, British subjects domiciled in England, married in Paris. Their marriage contract stipulated that their rights over property should be regulated in accordance with French law. Under this law a wife has a power of making a will. It was held by our courts that such a contract was to be enforced, and that the rights of the parties were the same that French subjects would have had under such a contract, and that, therefore, a will by the wife was valid (*x*).

SUB-RULE 1.—A marriage contract, or settlement, will, in the absence of reason to the contrary, be construed with reference to the law of the husband's

Construc-
tion of
marriage
contract
depends

(*u*) *Story*, s. 143.

Westlake, s. 371.

Feaubert v. Turat, *Pre. Ch.* 207.

Anstruther v. Adair, 2 *My. & K.* 513.

Williams v. Williams, 8 *Beav.* 547.

Este v. Smyth, 18 *Beav.* 112, 23 *L. J. (Ch.)* 705.

Duncan v. Cannan, *ibid.*, 128, 23 *L. J. (Ch.)* 265.

Bank of Scotland v. Cuthbert, 1 *Rose*, 481.

Watts v. Shrimpton, 21 *Beav.* 97.

McCormick v. Garnet, 5 *De G. M. & G.* 278.

Van Grutten v. Digby, 31 *Beav.* 561, 32 *L. J. (Ch.)* 179.

Byam v. Byam, 19 *Beav.* 58.

(*x*) *Este v. Smyth*, 18 *Beav.* 112. The form of the marriage contract, or settlement, ought, it would seem, to depend on the law of the place where it is made, pp. 151, 152, *ante*. It would, however, appear that our courts, when called upon to give effect to a marriage contract, will incline not to hold it invalid on account of merely formal invalidity under the *lex loci contractus*. *Van Grutten v. Digby*, 32 *L. J. (Ch.)* 179, 31 *Beav.* 561; *Hutchinson v. Cathcart*, 8 *Ir. Eq. Rep.* 394.

on law of
husband's
domicil.

actual (or intended ?) domicile at the time of the marriage (y).

"It appears to be a well-settled principle of law in "relation to contracts regulating the rights of property "consequent upon marriage, as far, at least, as personal "property is concerned, that if the parties marry with "reference to the laws of a particular place or country as "their future domicile, the law of that place or country is "to govern as the place where the contract is to be carried "into full effect" (z).

D. and M., persons domiciled in Scotland, marry in London. A marriage contract or settlement is made between them in the Scotch form. D. and M. afterwards become domiciled in England. The rights of the parties are, nevertheless, to be decided with reference to Scotch law, for "this contract, though prepared in England and a valid "English contract, is to be governed by the Scotch law, and "the construction and operation of it must be the same, "whether in or out of Scotland" (a).

The principle on which the rule rests (viz., that the parties contemplated in making their contract the effect of the law of the matrimonial domicile) shews, that the rule does not apply when it may be inferred that the parties had in view some other law.

Marriage
contract
may fix

SUB-RULE 2.—The parties may make it part of the contract, or settlement, that their rights shall

(y) See *Duncan v. Cannan*, 18 Beav. 128, 23 L. J. (Ch.) 265.

Byam v. Byam, 19 Beav. 58.

Anstruther v. Adair, 2 My. & K. 513.

Le Breton v. Miles, 8 Paige 261 (Am.).

1 *Bishop, Law of Marriage and Divorce*, 404.

"The decisions of the English tribunals establish . . . that where "there is an express contract it is governed, as to its construction, by the "law of the matrimonial domicile." *Phillimore*, s. 466.

(z) *Le Breton v. Miles*, 8 Paige, 261, 265, *per Curiam*. This statement of the law, though extracted from an American case, may be taken as representing the doctrine of English courts.

(a) *Duncan v. Cannan*, 23 L. J. (Ch.) 265, 273, *per Romilly, M.R.*

be subject to some other law than the law of the husband's domicile, in which case their rights will be determined with reference to such other law (b). law by which rights determined.

D. and M., domiciled in England, make it part of their marriage contract that their rights shall be regulated in accordance with the law of France. Our courts will, as far as possible, give effect to the contract in accordance with French law (b).

The same result would follow, if it could be fairly inferred from the terms of the contract, that the intention of the parties (though not expressed in so many words) was that it should be construed with reference to French law.

SUB-RULE 3.—The law of the husband's actual (or intended?) domicile at the time of the marriage will, in general, decide whether particular property (e.g., any future acquisition) is included within the terms of the marriage contract, or settlement. Future acquisitions.

The law with reference to which the marriage contract, or settlement, is construed, which is in general the law of the matrimonial domicile, must, it is conceived, as far as the question is a matter of law, determine whether any particular class of moveable property, e.g., goods and chattels acquired after the marriage, are included within the terms of the contract.

Property not included within the terms of the contract will be regulated by the rules applicable to cases where there is no marriage contract (c).

SUB-RULE 4.—The effect and construction of Contract not varied

(b) *Este v. Smyth*, 23 L. J. (Ch.) 705, 18 Beav. 112.

(c) See Rule 60, p. 268, *ante*.

Hoar v. Hornby, 2 Y. & C. 121.

Anstruther v. Adair, 2 My. & K. 513.

Duncan v. Cannan, 18 Beav. 128, 23 L. J. (Ch.) 265.

Phillimore, s. 476.

by change of domicile. the marriage contract, or settlement, is not varied by a subsequent change of domicile (d).

The effect of a contract must depend on the intention of the parties at the time of making it. A marriage contract, or settlement, must, therefore, be construed with reference to the law, whatever it was, which the parties had in view when the contract was made, *i.e.*, the law of the matrimonial domicile at the time of the marriage. No later change of domicile can affect its meaning (d).

Rule 62.

Rights of husband and wife on each other's death.

RULE 62.—The mutual rights of husband and wife in respect of succession to moveables on the death of the other are governed by the law of the deceased's domicile at the time of his or her death (e).

As the wife's domicile is legally that of her husband, this rule amounts in fact to saying, that the right to succession between the parties will depend in every case upon the domicile of the husband at the time when the death (in respect of which succession is claimed) takes place. If the husband dies first, the domicile to be looked to is his domicile at the time of his own death. If the wife dies first, the domicile in question is that of the husband at the time of her death.

(d) See *Duncan v. Cannan*, 18 Beav. 128, 23 L. J. (Ch.) 265.

(e) See *Westlake*, s. 373; *Savigny*, s. 379, pp. 347, 348.

CHAPTER X.

ASSIGNMENT OF MOVEABLES UNDER BANK-
RUPTCY (a).

RULE 63.—A bankruptcy in the country where the bankrupt is domiciled is, in so far as under the law of that country it involves an assignment of the bankrupt's property, an assignment of all the bankrupt's moveables, wherever situated, to the representative of his creditors (b).

Rule 63.
Bank-
ruptcy in
country of
bankrupt's
domicil
affects
moveables
wherever
situated.

Bankruptcy affects the moveables of a bankrupt

(a) See, as to discharge in bankruptcy which does not depend upon the law of domicil, *Extra-territorial effect of Discharge in Bankruptcy*, App., Note VIII.

(b) See *Story*, s. 409; *Westlake*, ss. 277, 278, 279; 2 *Bell's Commentaries on the Law of Scotland* (McLaren's ed.), pp. 568—574; *Sill v. Worswick*, 1 H. Bl. 665; *Phillips v. Hunter*, 2 *ibid.*, 402; *Hunter v. Potts*, 4 T. R. 182; *Jollet v. Deponthieu*, 1 H. Bl. 132 (n); *Solomons v. Ross*, 1 H. Bl. 131 (n); *Selkrig v. Davis*, 2 *Rose*, 291.

Bell gives a clear account of the general principles maintained by English as well as by Scotch courts as to the extra-territorial effect of bankruptcy.

The rule applies, it should be noticed, to all proceedings, under whatever name, which are of the nature of bankruptcy, i.e., by which an insolvent's property is transferred to his creditors or their representative. It is not easy to find a convenient name by which to describe the representative. Down to the passing of the Bankruptcy Act, 1869, the representatives of the creditors were termed assignees. In the Act of that year the representative was called a trustee. I have in general used the term trustee as the name for a creditor's representative under an English bankruptcy, and assignee as the name for such representative under a foreign bankruptcy.

Principle
involved in
Rule.

wherever situated. Hence, if by the law, *e.g.*, of Scotland (c), under which he is made bankrupt, all his moveable property is transferred to the representative of his creditors, his moveable, (or as it is often called in the cases, "personal" (d)) property in England is also transferred or assigned to such representative. "Personal property," it has been laid down, "then being governed by the law which governs the person of the owner, the condition of a bankrupt by the law of this country is, that the law, upon the act of bankruptcy being committed, vests his property upon a just consideration, not as a forfeiture, not on a supposition of a crime committed, not as a penalty, and takes the administration of it by vesting it in assignees, who apply that property to the just purpose of the equal payment of his debts. . . . The determinations of the courts of this country have been uniform to admit the title of foreign assignees. In the two cases of *Solomons v. Ross* (e) and *Jollet v. Deponthieu* (f), where the laws of Holland, having in like manner as a commission of bankrupt here, taken the administration of the property, and vested it in persons who are called curators of desolate estates (g), the Court of Chancery held that they had, immediately on their appointment, a title to recover the debts due to the insolvent in this country, in preference to the diligence of the particular creditor seeking to attach those debts" (h).

(c) This, as regards Scotland or any other part of the British dominions, may now be considered a result of the Bankruptcy Acts. See *Williams' Law and Practice in Bankruptcy* (2nd ed.), pp. 82, 96, but the Bankruptcy Acts only give effect, as regards the assignment of the moveables of a person domiciled in England, to what would be the law independently of the Acts.

(d) For the distinction between moveables and personal property see pp. 37, 38, *ante*.

(e) 1 Hy. BL 131(n).

(f) *Ibid.*, 132 (n).

(g) The cases referred to in this extract were decided in 1764 and 1791. The statements as to Dutch law must be read with reference to these dates.

(h) *Sill v. Worswick*, 1 Hy. BL 665, 691. Judgment of Lord Loughborough.

To put the same thing in other words, the principle of our courts is that a bankrupt's moveable property is to be treated, when the bankruptcy takes place in the country where he is domiciled, exactly as it would be treated if it were in fact there situated and within the jurisdiction of its courts. This principle is, however, subject to two limitations.

First.—A bankruptcy has not a greater extra-territorial effect than it has in the country where it takes place. Hence, it acts as an assignment of those moveables only situated in other countries which, had they been situated in the country where the bankruptcy occurs, would have been assigned to the representative of the creditors. Suppose, for example, that D., domiciled in Prussia, is made bankrupt at Berlin, and that under Prussian law certain classes of moveables are not assigned to the creditor's representative. Under this supposition, which is one made merely for the sake of illustration, moveables of the same class situated in England will not, under the German bankruptcy, be assigned to such representative. This limitation to the general principle that bankruptcy is an assignment of all the bankrupt's moveables, wherever situated, is embodied in the terms of the Rule.

Secondly.—Things in their nature moveable, which by the law of the country where they are situated, are held to be immoveables, are not affected by the bankruptcy of their owner in another country. This is a mere application of Rule 49 (*i*). Thus English heirlooms, title deeds, and other things held by English law to be immoveables, would not, if situated in England, be assigned under their owner's bankruptcy at New York to the American assignee.

The principle which English courts themselves apply in the case of a foreign bankruptcy, viz., that a bankruptcy is an assignment of the bankrupt's moveables wherever

Limitations to application of principle.

1st Limitation.

Extra-territorial effect limited by law of country where bankruptcy takes place.

2nd Limitation.

Extra-territorial effect limited to moveables according to law of situs.

Cases to which principle applies.

situated, they expect to be applied by foreign tribunals to the case of a bankruptcy in England.

"If the bankrupt happens to have property which lies "out of the jurisdiction of the law of England, if the "country in which it lies proceeds according to the principles of well-regulated justice, there is no doubt" [as our courts hold] "but it will give effect to the title of the [English] "assignees" (*k*). While, however, our courts can give full effect to this principle when the bankruptcy takes place in a foreign country, *e.g.*, New Zealand or Prussia, they cannot directly enforce the same principle when the bankruptcy takes place in England and the property is situated in a foreign country.

The following sub-rules exhibit the mode in which our courts apply the principle embodied in Rule 63 (*l*) to the different cases with which they may have to deal (*m*).

Bankruptcy in foreign country. Property in England.

SUB-RULE 1 (*n*).—A bankruptcy in any foreign country is an assignment to the representative of the creditors of all the bankrupt's moveables situated in England and of all debts due to him in England (*o*).

A person domiciled in New York (*p*) becomes bankrupt there. The effect on the bankrupt's moveables, *e.g.*, goods in his shop, situated in England, is the same (at any

(*k*) *Sill v. Worwick*, 1 H. B. 665, 691, judgment of Lord Loughborough.

(*l*) See p. 277, *ante*.

(*m*) As to the possible effect of a bankruptcy taking place in a country where the bankrupt is not domiciled, see Rule 64, p. 288, *post*.

(*n*) The three sub-rules are, of course, subject to the same limitations (see p. 279, *ante*) as the general rule of which they are applications. As to Scotland, see 19 & 20 Vict. c. 79, s. 102. As to Ireland, see 20 & 21 Vict. c. 60, s. 267.

(*o*) *Sill v. Worwick*, 1 Hy. Bl. 665.

Jollet v. Deponthieu, *ibid.*, 132 (*n*).

Solomons v. Ross, *ibid.*, 131 (*n*).

(*p*) See 2 Kent, p. 391, Note 1, as to Bankrupt Act of the United States.

rate from the moment of the bankruptcy) as it would be if the moveables had been situated in New York. So, again, the bankrupt's right to recover debts due to him in England is transferred to his American assignee.

As to the effect of an assignment under a foreign bankruptcy, the following points deserve notice :

Points to be noted as to assignment under foreign bankruptcy.

(1) If the bankrupt, after his bankruptcy, transfers his goods (*e.g.*, by gift) to a third person, the title of the foreign assignee will be preferred to that of the donee.

(2) Suppose that a creditor of the bankrupt has, after the bankruptcy in the United States, attached a debt due to the bankrupt, that is to say, has by legal steps compelled a debtor of the bankrupt to pay over to such creditor the debt due to the bankrupt. This attachment will not profit the attaching creditor, for it will not hold good against the title of the American assignee. The debt, when seized by the creditor, had become a debt due not to the bankrupt but to the assignee, and hence, can no longer be attached by the creditor.

D., domiciled at Amsterdam, stopped payment there on the 18th December, 1759. On the 1st January, 1760, the proper court at Amsterdam took cognizance of D.'s stopping payment. On the 2nd, D. was declared bankrupt at Amsterdam, and a curator or assignee of his property appointed. On the 20th December, 1759, X., a creditor of D., made an affidavit in the Mayor's Court of London, and attached £1200 in the hands of M., who was a debtor of D.'s to that amount. On the 8th March, 1760, X. obtained judgment and issued execution against M., who, being unable to pay £1200, gave X. a note for the amount, payable in a month. On the 12th March, A., the assignee of D., claimed the £1200. It was held that A. was entitled to the money as against X., the attaching creditor (*q*).

(*q*) *Solomons v. Ross*, 1 H. Bl. 181 (*n*). In this case it may, I conceive, be assumed that D. was domiciled at Amsterdam. See also *Jollet v. Deponthieu*, *ibid.*, 132 (*n*).

Question
as to re-
trospective
effect of
foreign
bank-
ruptcy.

A bankruptcy has, under the laws of many countries, a retrospective effect. Transactions, that is to say, which have taken place before the bankruptcy, are treated as if they had taken place after it. A question, therefore, may arise as to the extent to which a bankruptcy in a foreign country will be allowed a retrospective effect in England. The law of Scotland (s), for example, invalidates voluntary dispositions by the bankrupt made within sixty days of the bankruptcy in favour of particular creditors. D., domiciled in Scotland, gives goods on the 1st of January to X. in England in payment of a debt. On the 1st February he is made bankrupt in Scotland. Can A., his assignee in bankruptcy, treat the gift as invalid? It is probable that he cannot, and that our courts would not give a retrospective effect to a Scotch bankruptcy, as regards transactions taking place in England before the commission of the act of bankruptcy.

Bank-
ruptcy in
England.
Property
in British
dominions.

SUB-RULE 2.—A bankruptcy in England is an assignment to the trustee in bankruptcy of all the bankrupt's moveables situated, and of all the debts due to the bankrupt, in any part of the British dominions (t).

On a bankruptcy in England the moveable property of the bankrupt situated in any part of the British dominions is now, under the Bankruptcy Act, 1869, vested in the trustee in bankruptcy (u). This sub-rule, therefore, is in strictness not so much a result of the principle laid down

(s) 2 *Bell, Commentaries on the Law of Scotland* (Mc Laren's ed.), pp. 166, 167, 196, 197; *White v. Briggs* (1843), 5 D. 1148.

(t) See Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 4, 15, 17, and compare Bankruptcy Act, 1849, ss. 141, 142. See also *Selkrig v. Davis*, 2 Rose, 291; *Bank of Scotland v. Cuthbert*, 1 Rose, 462; *Williams' Bankruptcy Practice*, (2nd ed.,) p. 96.

(u) *Ibid.*

in Rule 63 (v) as of the provisions of an Act of the Imperial Parliament.

D., domiciled in England, but resident in Edinburgh, is made bankrupt in England. All his stock in trade in his shop in Edinburgh becomes vested in A., the English trustee in bankruptcy.

SUB-RULE 3.—A bankruptcy in England ought, according to the view of our courts, to be an assignment to the trustee in bankruptcy of all the bankrupt's moveables situated, and of all the debts due to the bankrupt, in any country not forming part of the British dominions (x).

Bankruptcy in England. Property not in British dominions.

English courts cannot directly determine what shall be the effect in a foreign country of an English bankruptcy. They may, however, be called upon indirectly to pronounce a decision on the point. X., a creditor of the bankrupt, may, after the bankruptcy, obtain in a foreign country either possession of the property of the bankrupt, or payment of debts due to him from the bankrupt. X. may then come to England and be sued here by A., the trustee in bankruptcy, for the value of the property or the money so obtained. Our courts must then decide between the title of X., the creditor, and A., the trustee, or in substance must determine what is the effect of an English bankruptcy in a foreign country. From the cases decided on the subject, it may, with considerable

(v) See p. 277, *ante*. It, therefore, applies to cases beyond the scope of that principle, as where the bankrupt is not domiciled in England. See Rule 64 (1), sub-clause (i.), p. 288, *post*.

(x) *Hunter v. Potts*, 4 T. R. 182; *Sill v. Worswick*, 1 H. Bl. 665; *Phillips v. Hunter*, 2 H. Bl. 402.

"Foreign" in the remarks on this Sub-Rule means not subject to the British Crown. Sub-Rule 2, p. 282, *ante*, states the effect of an English bankruptcy in countries such as Canada or New Zealand, which, though forming part of the British dominions, are foreign in the sense in which the word is used in these Rules. See pp. 1, 33, *ante*.

probability, be inferred (*y*) that English courts will, in determining this question, adhere to the following principles.

Creditor who recovers payment without legal process cannot retain it against trustee.

First.—Any creditor who, without legal process, obtains in a foreign country the moveable property of a bankrupt, may, when sued in an English court by the trustee, be compelled to refund the value of such property. For the current of authorities shews “that the operation of the “bankrupt laws with respect to the personal property of “the bankrupt, when that property is brought into this “country by any one who has obtained it, is to carry the “right to recover it to the assignees for the benefit of all “the creditors” (*z*).

Effect of recovery of payment by creditor under legal process depends on matter decided by court.

Secondly.—If any creditor, by legal process, recovers in a foreign country debts due to him from the bankrupt, the effect of such recovery will depend on the answer to the question, whether the foreign court did or did not determine that the title of the creditor was good as against the title of the trustee.

If the creditor recovered the debt under circumstances which did not necessarily involve the preference by the foreign court of his title to that of the trustee (as where the creditor recovers the money due to him from the bankrupt without notice to the court of the fact of the bankruptcy), then the creditor is to be held when sued here to have recovered the money to the use of the trustee,

(*y*) This inference, grounded on the three cases referred to in note (*x*), p. 283, *ante*, which were decided at a time when the bankruptcy law was different from what it is at present, and when points connected with the conflict of laws had been little studied, is, to a certain extent, conjectural. The necessary results of these cases, though not all which may be inferred from them, is thus stated by Bell: “In England . . . it is held, “(1) That an English creditor who, having notice of the bankruptcy, makes “affidavit in England in order to proceed abroad, cannot retain against the “assignees what he recovers. (2) That a creditor in the foreign country “would not, if preferred by the laws of that country, be obliged to refund “in England. And, (3) That, at all events, such a creditor cannot take “advantage of the bankrupt laws in England without communicating the “benefit of his foreign proceedings.” 2 *Bell, Commentaries on the Law of Scotland* (McLaren's ed.), p. 573.

(*z*) *Sill v. Worswick*, 1 H. Bl. 665, 694, *per* Lord Loughborough.

and is liable to refund it. There would appear, in this case, at any rate, to be no difference between the position of an English and of a foreign creditor (a).

If the creditor recovered the debt under circumstances which necessarily involved the preference by the foreign court of his title to that of the trustee, as where the fact of the bankruptcy is brought before the court, or the trustee takes part in the proceedings, then the creditor, though the decision of the foreign court is in point of principle erroneous, has the advantage of the judgment in his favour (b), and if sued here by the trustee cannot be compelled to refund the money recovered in the foreign country. "I do not wish," it has been said by Lord Loughborough, "to have it understood, that it follows as "a consequence from the opinion I am now giving, (I "rather think that the contrary would be the consequence "of the reasoning I am now using), that a creditor in " [a foreign] "country, not subject to the bankrupt laws " [of this country], "nor affected by them, obtaining payment "of his debt, and afterwards coming over to this country, "would be liable to refund that debt. If he had recovered "it in an adverse suit with the assignees, he would clearly "not be liable. But if the law of that country preferred "him to the assignees, though I must suppose that deter- "mination wrong, yet I do not think that my holding a "contrary opinion would revoke the determination of that

(a) See *Sill v. Worwick*, 1 H. Bl. 665, 693; *Phillips v. Hunter*, 2 H. Bl. 402. This I understand to be Westlake's opinion. His words are: "We "may probably add that if no intimation was given previous to the com- "pletion of the recovery by attachment, the same presumption will be "raised" [that the creditor recovered for the use of the trustee] "and the "creditor, whether foreign or English, compelled to refund, although the "law of the place of attachment might refuse efficacy to such intimation "even if given *pendente lite*." *Westlake*, s. 279.

(b) This is almost involved in the principle of such cases as *Cammell v. Sewell*, 5 H. & N. 728; 29 L. J. (Ex.) 350; *Castrique v. Imrie*, L. R. 4 H. L. 414, which, though they have no direct reference to bankruptcy, determine that a title acquired under a foreign judgment is valid here.

"country, however I might disapprove of the principle on which that law so decided" (c).

The language of Lord Loughborough, as of the judgments in *Hunter v. Potts* (d), and in *Phillips v. Hunter* (e), certainly suggest that under no circumstances could an English creditor avail himself, as against the trustee, of a judgment obtained in his favour in a foreign court, and this appears to be the opinion of Mr. Westlake. "If," he writes, "the creditor be an Englishman, this farther circumstance strips him of the protection he would otherwise derive from the *res judicata*, an effect which will be accomplished in legal form by raising an irrebuttable presumption that what he recovered he recovered to the use of the assignees" (f). This view, if correct, probably applies, under the present state of the bankruptcy law, to every creditor who is a British subject, but in spite of the consideration due to the authorities by which this view is supported, its correctness is (it is conceived) extremely doubtful, and the effect of the foreign judgment is probably the same whatever be the nationality of the creditor.

Creditor
recovering
payment
abroad
cannot
prove
without
sharing
what he
has re-
covered.

Thirdly.—A creditor, who has recovered or received abroad any part of the bankrupt's moveable estate, will not be allowed to prove under the English bankruptcy unless he brings into the common fund the part so acquired (g).

"If a particular creditor who is able to lay hold of assets of the bankrupt abroad comes here to share with the other creditors, he must bring into the estate here that which the law of the foreign country has given him over the other creditors" (h).

(c) *Sill v. Worwick*, 1 Hy. Bl. 665, 693, per Lord Loughborough.

(d) 4 T. R. 182.

(e) 2 H. Bl. 402, 408.

(f) *Westlake*, s. 279. See *Story*, s. 409, but contrast *Phillimore*, s. 770.

(g) See *Phillimore*, s. 70.

Conf. Selkirk v. Davis, 2 Rose, 291.

Ex parte Wilson, L. R. 7 Ch. 490.

(h) *Ex parte Wilson*, L. R. 7 Ch. 490, 493. Judgment of James, L.J.

This principle would seem to apply as well to an alien as to a British subject. It applies whether the advantage be gained by means of an attachment or by proof under a foreign bankruptcy. It applies, however, only to property which would, or at any rate ought, according to the view of our courts, to pass to the trustee or assignee. It does not, therefore, in general apply to real property (*i*).

1. D., domiciled in England, is made bankrupt in London. X., a creditor, obtains, without legal process, in France from D., after his bankruptcy, payment of a debt due from D. to X. On X's coming to England he is sued by A., the trustee, for the amount of the money paid him by D. A. can recover from X. the money paid by D. (*k*).

2. D., domiciled in England, is made bankrupt in London. X., a creditor of D's, recovers, after D's bankruptcy, in a Pennsylvanian court, by means of attachment, £100 due from D. to X. The court has no notice of the bankruptcy, and there is nothing to show that the court intended to give a judgment as to X's title, as against A., the trustee in bankruptcy. X., on coming to England, is sued by A. for the £100. A. can recover the £100 as money received to his use by X. (*l*).

3. D., domiciled in England, is made bankrupt in London. After the bankruptcy X., an American creditor, recovers in a Pennsylvanian court by attachment £100, due from D. to X.; an English creditor, Y., recovers in the same court, also by attachment, £50 due to him from D. The court has in both cases notice of the bankruptcy, and holds that the title of each of the creditors was better than the title of A., the trustee in bankruptcy. X. and Y. come to England, and A., the trustee, sues each of them for the money obtained under the Pennsylvanian judgments. A. certainly cannot recover the £100 from X., the American. Possibly he can recover the £50 from Y., but this is not certain.

(i) See *Rules as to Immovables*, App., Note IV.

(k) *Conf.* judgment of Lord Loughborough in *Sill v. Worrick*, 1 H. Bl. 665, 689.

(l) *Sill v. Worrick*, 1 H. Bl. 665, 689; *Phillips v. Hunter*, 2 H. Bl. 402.

4. X., the American creditor, under the circumstances stated in the last case, attempts to prove under D.'s bankruptcy for a further sum of £500, due from D. to X. He will not be allowed to prove unless he pays over to A., the trustee, the £100 recovered.

Rule 64.

Effect of
bank-
ruptcy in
country
where
bankrupt
not domi-
ciled.

RULE 64.—The effect of a bankruptcy in a country where the bankrupt is not domiciled is, as regards his moveables, as follows :

(1.) If the bankruptcy takes place in any part of the United Kingdom

(i) the bankruptcy has the same effect throughout the British dominions as it would have had if the bankrupt had been domiciled in the United Kingdom, *i.e.*, it is an assignment to the representative of the creditors of all the bankrupt's moveables situated, and of all the debts due to him, in any part of the British dominions ;

(ii) the bankruptcy is not an assignment of any moveables of the bankrupt's situated, or of any debts due to the bankrupt, in any country not forming part of the British dominions.

(2.) If the bankruptcy takes place in any country not part of the United Kingdom, the bankruptcy has in England the same effect as it would have if the bankrupt were domiciled in such country (?)

It is often assumed, both in works treating of the conflict of laws and in legal judgments, that a bankruptcy can take place only under the law of the bankrupt's domicile. Hence, it is difficult to discover authorities for determining what our courts hold to be the extra-territorial effect, as an assignment, of a bankruptcy in a country where the bankrupt is not domiciled. Under English or colonial law, however, a man may apparently be made bankrupt in a country where he is not domiciled (*n*). The inquiry, therefore, arises, what is the effect of such a bankruptcy? Rule 64 affords a reply, which, however, is to a great extent based on conjecture.

Bankruptcy may take place where bankrupt not domiciled.

What extra-territorial effect?

(i.) The effect of a bankruptcy in any part of the United Kingdom is, supposing the bankrupt not to be domiciled in the country, *e.g.*, England, where the bankruptcy takes place, different in countries within and in countries beyond the British dominions.

(i) Of bankruptcy in United Kingdom

First.—The effect of such a bankruptcy throughout the British dominions depends on Acts of the Imperial Parliament, and is unaffected by the fact that the bankrupt is not domiciled in England. The bankruptcy, therefore, is an assignment to the trustee of the bankrupt's moveables situated in any part of the British dominions, as, for example, in Scotland or in New Zealand.

in British dominions

Secondly.—The effect of such a bankruptcy in any country not forming part of the British dominions, *e.g.*, Prussia, must depend upon Prussian law, but the probability is that foreign courts will not give extra-territorial effect to such a bankruptcy.

beyond British dominions.

(ii.) Suppose that the bankruptcy takes place beyond the limits of the United Kingdom, the question what effect will be given to it by our courts does not admit of a certain answer. The better opinion appears to be that if the bankrupt is carrying on business, even though not domiciled, in the country where the bankruptcy takes place,

(ii) Of bankruptcy beyond United Kingdom.

(*n*) *Ex parte Crispin*, L. R. 8 Ch. 374; *Ex parte Pascal*, 1 Ch. D. 509; *In re Blithman*, L. R. 2 Eq. 23; *Re Davidson's Trusts*, L. R. 15 Eq. 383.

English tribunals will hold that the representative of his creditors is entitled to his goods in England (o).

Rule 65.

Effect
given to
earliest of
several
bank-
ruptcies.
Bank-
ruptcy
within
United
Kingdom.

RULE 65.—Where there are several bankruptcies in different countries effect will be given, as an assignment of the bankrupt's moveables, to that bankruptcy which is earliest in date (?)

First.—This Rule certainly holds good when the earliest of several bankruptcies takes place within the United Kingdom. D. is made bankrupt in Scotland on the 1st, and in England on the 2nd of January. As the Scotch bankruptcy at once passes to the assignee all the bankrupt's property, such property has, when the English bankruptcy takes place, already ceased to belong to the bankrupt; and the same remark applies in principle to a bankruptcy in England prior to a bankruptcy in Scotland, as well as to a bankruptcy in Ireland prior to an English or Scotch bankruptcy.

Bank-
ruptcy
beyond
United
Kingdom.

Secondly.—The Rule probably holds good when the earliest of several bankruptcies takes place in a country beyond the United Kingdom, *e.g.*, Prussia. If the bankrupt is domiciled there the Prussian bankruptcy has the effect of assigning (*p*) to the foreign assignees what once was the bankrupt's moveable property in England; if the bankrupt is not domiciled in Prussia, and if (which is doubtful) our tribunals will give effect at all to a bankruptcy in any country beyond the United Kingdom where the bankrupt is not domiciled (*q*), the Prussian bankruptcy will again have the effect of assigning the bankrupt's moveables to the Prussian assignees. In either case there will not, at the time of a later English bankruptcy, be any moveable property of the bankrupt on which such bankruptcy can operate.

(o) Compare *In re Bithman*, L. R. 2 Eq. 23, with *Re Davidson's Trusts*, L. R. 15 Eq. 383.

p) Rule 63, p. 277, *ante*.

(*q*) See Rule 64, p. 288, *ante*.

CHAPTER XI.

ASSIGNMENT OF MOVEABLES BY DEATH.

A.—*Intestate Succession.*

RULE 66.—The distribution of and succession to the moveables of an intestate is regulated by the law of his domicile at the time of his death, without any reference to the law of

Rule 66.
Intestate's
property
distributed
according
to law of
intestate's
domicil.

- (1) the place of his birth, or
- (2) the place of his death, or
- (3) the place of his domicile of origin, or
- (4) the place where the moveables are, in fact, situated (a).

“The rule is, that the distribution of the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death, without any regard whatsoever to the place either of the birth or the death [or the domicile of origin] or the situation of the property at that time” (b). “The universal doctrine now recognised by the Common Law, although formerly much contested, is that the suc-

(a) See 2 *Williams' Executors* (6th ed.), p. 1401; *Story*, ss. 480—482a; *Bruce v. Bruce*, 6 Bro. P. C. 566; *Somerville v. Somerville*, 5 Ves. 740a; *Stanley v. Bernard*, 3 Hagg. Ecc. 373; *Dogliani v. Crispin*, L. R. 1 H. L. 301.

(b) 2 *Williams' Executors* (6th ed.), p. 1401.

"cession to personal property is governed exclusively by
 "the law of the actual domicile of the intestate at the time
 "of his death" (*d*).

If D., for example, dies domiciled in France, the succession to his moveables, even though they may be in fact situated in England, is, as far as our courts can control the matter, governed by the law of France as it existed at the moment of D.'s death. It is to be observed that the expression "law of his domicile" means in this Rule the rules applicable to the case of the particular intestate by the law of the country where he dies domiciled, which in the instance, for example, of an English subject dying domiciled in a foreign country, need not be the same as the ordinary rules applicable in the case of successions to the property of native (*e.g.*, French) intestates (*e*), and further, that succession to an intestate is not affected by a change subsequent to his death in the law of the country where he was domiciled (*f*).

1. D., a French subject, dies intestate and domiciled in England. Succession to his moveables is governed by the English Statute of Distributions, without any reference to the law of France.

2. D., a British subject domiciled in France, dies intestate in London. The succession to the furniture of D.'s house in London is regulated by the rules which govern in France succession to the moveables of a British subject dying domiciled in France.

3. D., a British subject, dies domiciled in Paraguay. After D.'s death the legislature of Paraguay changes the rules as to succession to moveable property. D. leaves moveables in England. A. was entitled to succeed to D.'s property

(*d*) *Story*, s. 480. The terms "personal property" and "personal estate" must in these quotations be taken as equivalent to moveables. See *Freke v. Lord Carbery*, L. R. 16 Eq. 461; *In Goods of Gentili*, Ir. L. R. 9 Eq. 541.

(*e*) See 2 *Williams' Executors* (6th ed.), p. 1401, note (*u*), and as to the same point in connection with testamentary succession, pp. 295, 296, *post*.

(*f*) *Lynch v. Government of Paraguay*, L. R. 2 P. & D. 268.

under the law of Paraguay as it existed at the time of D.'s death. B. is entitled to succeed to D.'s property under the law of Paraguay as altered after D.'s death. The question of succession to D.'s moveables in England comes before our courts after the change in the law of Paraguay. A. is entitled to succeed to the moveables (g).

4. D., a British subject domiciled in Portugal, dies there intestate leaving A., an illegitimate son, who, by Portuguese law, is entitled to succeed to D.'s property. D. leaves moveables in England. A. is entitled to succeed to the moveables (h).

5. D., a man domiciled in Scotland, after the birth of his illegitimate son A., marries M., A.'s mother, whereby A. is by Scotch law legitimated (i). D. dies intestate, residing but not domiciled in England, and leaves goods there. A. is entitled to succeed to the goods (k).*

6. D., a man domiciled in Scotland, after the birth of his illegitimate son A., marries M., A.'s mother, whereby A. is by Scotch law legitimated. After the marriage D. acquires an English domicile, dies intestate domiciled in England, and leaves goods there. Is A. entitled to succeed to the goods? It would seem that he is (l).*

RULE 67.—Subject to the exception hereinafter mentioned, the law of a deceased person's domicile at the time of his death determines whether he does or does not die intestate (m).

Rule 67.

Testacy or intestacy governed by law of domicile.

(g) See *Lynch v. Government of Paraguay*, L. R. 2 P. & D. 268.

(h) *Doglioni v. Crispin*, L. R. 1 H. L. 301.

(i) See Rule 35, p. 181, *ante*.

* i.e., of course to the share, supposing, e.g., there are other children, which comes to him under Scotch law.

(k) See *Dalhousie v. McDonall*, 7 Cl. & F. 817.

(l) See *Skottowe v. Young*, L. R. 11 Eq. 474, in favour of this view; but see *contra*, 2 *Kent* (12th ed.), p. 430, note (c). The question, of course, must be decided according to English law. The doubt at bottom is whether English law holds A. for any purpose legitimate. See *Legitimacy*, App., Note V.

(m) See Rules 63, 69, pp. 294, 298, *post*.

This rule is an immediate result of the principle that the validity of a will is in general determined by the law of the testator's domicile (*n*). D., a French subject domiciled in England, leaves an unattested testamentary document written wholly in his own hand, and signed by himself. He leaves no other will. Our courts decide, looking wholly to ordinary English law, that the document is not a will, *i.e.*, that D. dies intestate.

Excepted cases under 24 & 25 Vict. c. 114. *Exception.*—A person may, under 24 & 25 Vict. c. 114, not die intestate as to moveables within the British dominions, though held to be intestate by the law of the country where he dies domiciled.

The effect of 24 & 25 Vict. c. 114 (*o*) is, that in certain cases (*p*) wills are held valid by courts throughout the British dominions which are not made in accordance with the testator's *lex domicilii* at the time of his death.

B.—Testamentary Succession.

(i) *Validity of Will.*

Rule 68.

Will good according to law of testator's domicile is valid.

RULE 68.—Any will of moveables which is valid according to the law of the testator's domicile at the time of his death is valid (*q*).*

The general principle which governs testamentary no

(*n*) See Rule 68, *post*, and Rule 69, p. 298, *post*.

(*o*) See for this Act, *Foreign Wills Acts*, App., Note IX.

(*p*) See pp. 303—306, *post*.

(*q*) *i.e.*, of course valid in England, *Williams' Executors* (6th ed.), pp. 350—360.

* Rules 68—70, pp. 294—308, *post*, deal with cases where there has been no change of the testator's domicile between the execution of his will and his death.

less than intestate succession is, that the law of the country in which the deceased was domiciled at the time of his death not only decides the course of distribution or succession to his moveables, but also regulates the decision as to what constitutes his last will, and as to whether and how far it is valid, without regard to the place either of his birth or of his death, or to the situation of the moveables at the time of his death. This principle, which is to a certain extent modified (*t*) when the courts have to decide how far a will is invalid here on account of grounds of invalidity arising from the law of the testator's domicil, is fully carried out in reference to wills valid by that law. The object of our courts is to deal with such a will exactly as the courts of the domicil would deal with it. Hence, on the one hand, if the deceased is a foreigner dying domiciled in England though resident abroad, the will, if it is good according to English law, will be held valid here, without reference to the law of the country to which he belongs by nationality, or where he is resident; and, on the other hand, if D. is a person resident, whether in England or abroad, but domiciled in a foreign country, our courts will hold valid any will of moveables good by the law of the country, *e.g.*, France, where the testator is domiciled.

"When it is said that the law of the country of [the "deceased person's] domicil (*u*) must regulate the succession, it is not always meant to speak of the general law, "but, in some instances, of the particular law which the "country of domicil applies to the case of foreigners dying "domiciled there and which would not be applied to a "natural born subject of that country. Thus in *Collier v. Rivaz* (*x*), the testator, an English born subject, died "domiciled in Belgium, leaving a will not executed according to the forms required by the Belgian law: But by "that law, the succession in such a case is not to be

(*t*) See, *e.g.*, Rule 69, Exceptions 1 and 2, pp. 303, 305, *post*.

(*u*) See for application of same principle to intestate succession, p. 291, *ante*.

(*x*) 2 Curt. 855.

"governed by the law of the country applicable to its "natural born subjects, but by the law of the testator's own "country: And it was held that the will, being valid "according to the law of England, ought to be admitted to "probate" (y).

This distinction between the ordinary law of, *e.g.*, France, and the rule applicable by the law of France to the particular case is of special importance as regards the wills of foreigners who, though domiciled abroad, make their wills and die in England. For continental courts generally, in accordance with the maxim *locus regit actum*, hold that a will is valid which is executed according to the formalities required by the law of the country where the execution takes place. If, therefore, a Frenchman domiciled in France, but resident in England, duly executes his will according to the English Wills Act, the will, even were it not in accordance with the forms required by French law of Frenchmen making wills in France, is probably valid "according to the law of the testator's domicile," in the sense required by the Rule, and, therefore, is to be held valid in England (z).

When once the rights of the parties under the will of a person domiciled in a foreign country are determined by the courts of that country, English tribunals will follow the decision of the foreign court. "When the Court of "Probate is satisfied that the testator died domiciled in a "foreign country, and that his will, containing a general "appointment of executors, has been duly authenticated "by those executors in the proper court in the foreign "country, it is the duty of the Probate Court in this "country to clothe the foreign executors with ancillary "letters of probate to enable them to get possession of that "part of the personal estate which was locally situate in

(y) 1 *Williams' Executors* (6th ed.), p. 353. See the observations on *Collier v. Rivaz* by Lord Wensleydale in *Bremer v. Freeman*, 10 Moore P. C. 306, 374. See also *Maltass v. Maltass*, 1 Robert. 67.

(z) Compare *In Goods of Lacroix*, 2 P. D. 94.

"England" (a). So, further, the judgment of the court of the domicile of the deceased is binding on English courts in all questions as to the succession and title to moveables where the same questions between the same parties are at issue which have been decided by the court of the domicile (b). A will, in short, is valid in England which either is good by the law of the testator's domicile, or has been established as good in the courts of such foreign domicile. (c).

1. D., a married woman domiciled in Spain, makes a will of moveables situated in England. By the law of Spain she is capable of making a will, and her will is good. The will is valid here (d).

2. D., a Frenchman domiciled in France, but resident in England, makes a will of moveables in the form required by English law. The French courts hold it valid as being made in accordance with the *lex actus*, or in other words in accordance with the forms required by the law of the place of execution. The will is valid (e).

3. D., a Frenchman domiciled in France, makes a holograph will of moveables valid by the law of France, but not conforming to the provisions of the English Wills Act, and thereby leaves the furniture of D.'s house in England to A. The will is valid.

4. D., a person domiciled in Ireland, makes a will leaving money in the English funds to A., upon trusts as to accumulation which are prohibited by Thellusson's Act, 39 & 40 Geo. 3, c. 98, which, however, does not extend to Ireland. The will is valid (f).

(a) 1 *Williams' Executors* (6th ed.), p. 356.

Anderson v. Laneville, 2 Sw. & Tr. 24, 9 Moore P. C. 325.

(b) *Dogliani v. Crispin*, L. R. 1 H. L. 301; 1 *Williams' Executors* (6th ed.), p. 357.

(c) *In Goods of Deshaie*, 34 L. J. (P. & M.) 58.

(d) *In Goods of Maraver*, 1 Hagg. 498. *Story*, s. 465.

(e) See *In Goods of Lacroix*, 2 P. D. 94.

(f) See *Freke v. Lord Carbery*, L. R. 16 Eq. 461.

(ii.) *Invalidity of Will.*

Rule 69.
 Will not
 good
 according
 to law of
 testator's
 domicile is
 invalid.

RULE 69.—Any will of moveables which is invalid according to the law of the testator's domicile at the time of his death (*g*) on account of

- (1) the testamentary incapacity of the testator (*h*), or
 - (2) the formal invalidity of the will (*i.e.*, the want of the formalities required by such law) (*i*), or
 - (3) the material invalidity of the will (*i.e.*, on account of its provisions being contrary to such law) (*k*),
- is (subject to the exceptions hereinafter mentioned) invalid.

(1) Testamentary incapacity of testator.

A will executed by a testator who is under an incapacity, *e.g.*, on account of infancy, by the law of his domicile, will not be held valid in England. This clause of the rule is not affected by 24 & 25 Vict. c. 114, and applies as well to British subjects as to aliens (*l*).

D. is domiciled in a country where the age of majority is twenty-five, and where an infant cannot make a will.

(*g*) See last note on p. 294, *ante*; and as to effect of change of domicile, pp. 308—312, *post*.

(*h*) *In Goods of Maraver*, 1 Hagg. 498; *Story*, s. 465, citing *Lawrence v. Kittridge*, 21 Conn. 582 (Am.).

(*i*) 1 *Williams' Executors* (6th ed.), pp. 350—360; *Craigie v. Lewin*, 3 Curt. 435; *De Zichy Ferrario v. Lord Hertford*, *ibid.*, 463, 486; *Bremer v. Freeman*, 10 Moore P. C. 306; *Enokhin v. Wylie*, 10 H. L. C. 1, 31 L. J. (Ch.) 402.

(*k*) *Westlake*, s. 328; *Whicker v. Hume*, 7 H. L. C. 124, 28 L. J. (Ch.) 396; *Thornton v. Curling*, 8 Sim. 310; *Campbell v. Beaufoy*, Johns. 320.

(*l*) *In Goods of Maraver*, 1 Hagg. 498; *Story*, s. 465.

D., when resident but not domiciled in England, makes a will of moveables at the age of twenty-two and dies. The will is invalid.

D., domiciled in England but living in Virginia, makes a will when nineteen years of age. The will, though valid by the law of Virginia, is invalid here, on the ground that an infant is incapable of making a will (*m*).

A will, though made by a person capable of making it, ^{(2) Formal invalidity of will.} may nevertheless be invalid for want of some formal requisite, *e.g.*, signature by the testator, attestation by the required number of witnesses, and so forth. It may, in short, be defective for want (to use the terms of English law) of due execution. Such a defect constitutes a formal invalidity.

The question whether a will is duly executed, or, in other words, whether it is or is not formally valid, must be determined in accordance with the law of the testator's domicile. In cases, in short, of testamentary disposition, as in cases of intestate succession, the rule of our courts (though subject now, as regards formal validity, to considerable exceptions (*n*)) is to look to the law of the testator's domicile. This, it should carefully be noted, is still the rule. It applies to all wills, whether of British subjects or of aliens, which, for whatever reason, do not fall within the hereinafter enumerated exceptions (*o*).

1. D., an American citizen domiciled at New York but resident in England, makes his will while in England according to the formalities required by the English Wills Act. The will is invalid according to the law of New York for want of publication (*p*). D.'s will is invalid.

2. D., an American citizen domiciled at New York,

(*m*) *Revised Code of Virginia*, 224, cited 4 *Kent* (12th ed.), p. 506, note (*e*).

(*n*) See pp. 303—306, *post*.

(*o*) See, *e.g.*, *In Goods of Lacroix*, 2 P. D. 94; but note that the "law of the testator's domicile" means, as already explained (see pp. 295, 296, *ante*), the law or rule applicable to the particular case.

(*p*) See 4 *Kent* (12th ed.), p. 515, note (*b*), and *New York Revised Statutes*, Part II., cap. vi., s. 35.

executes when in France a holographic will valid by the law of France, but not attested as required by the law of New York. D. leaves moveable property in England. D.'s will is invalid.

3. D., a British subject born in the Mauritius, comes to England and there acquires a domicile. D., whilst in London, executes a will of moveables in England according to the forms required by the law of Mauritius, but not according to the English Wills Act. The will is invalid (q).

4. D. is a naturalised British subject resident in England, but domiciled from birth in one of the United States. D., retaining his American domicile, makes, whilst on a visit to Prussia, a will, which is made according to the formalities required by the English Wills Act, but not according to the formalities required either by the law of D.'s domicile or by Prussian law. D.'s will is not valid here (r).

(3) Material
invalidity.

A will made by a person under no testamentary incapacity (s) and duly executed (or formally valid (t)) may, nevertheless, be invalid, or wholly or in part inoperative, because it contains provisions to which the law will not give effect. Thus, English law prohibits bequests upon trust for accumulation beyond certain periods (u); the law of France (v), as of Scotland (x), invalidates bequests of more than a certain proportion of the testator's property in derogation of the rights of his widow or children; the law of Louisiana makes void a bequest for charitable purposes to an unincorporated body of persons (y). Such invalidity arising

(q) Remark that this will does not come within Exception 1, p. 303, *post*, or within Exception 2, p. 305, *post*.

(r) Such a will being invalid by the law of D.'s domicile falls within Rule 69, and does not fall within either of the Exceptions. See *Foreign Wills Acts*, App., Note IX.

(s) See p. 298, *ante*.

(t) See p. 299, *ante*.

(u) *Thellusson's Act*, 39 & 40 Geo. 3, c. 98.

(v) See *Thornton v. Curling*, 8 Sim. 310.

(x) *Conf. Whicker v. Hume*, 7 H. L. C. 124, 28 L. J. (Ch.) 396.

(y) See Scotch case, *Boe v. Anderson* (7th March, 1862), 24 D. 862.

Compare 2 *Williams' Executors* (6th ed.), p. 981.

from the nature of the bequest is termed *material* or *intrinsic* invalidity, and whether a will is or is not void wholly or in part on account of such material or intrinsic invalidity depends upon the law of the country where the testator is domiciled. Thus, where D., a British subject domiciled in France, made a disposition of his moveable property, which, though valid by the law of England, was invalid by the law of France, the will was held inoperative (z).

Nor is the effect of the material invalidity of a will affected, at any rate where there is no change of domicil, by the Foreign Wills Act, 24 & 25 Vict. c. 114 (a). That Act makes wills formally valid, and, therefore, admissible to probate, which might otherwise be bad for defects of form; but even when a will has been admitted to probate in solemn form, and, therefore, must be held not defective as to its formal requisites, it is, in so far as its provisions contravene the law of the testator's domicil, treated here as inoperative, and the persons obtaining probate will be held by the courts to be trustees for those who would be entitled to succeed to deceased's property, if (as far as the inoperative provisions go) he had died intestate. Where D., domiciled in France, made a disposition of his moveable property invalid by the law of France, and probate of the will was granted to the executor, it was held that the executor was bound to carry out the provisions of the will in conformity with the law of France, *i.e.*, to treat as inoperative the directions which contravened French law (b). Where a will was

(z) *Thornton v. Curling*, 8 Sim. 310.

Campbell v. Beaufoy, Johnson 320.

See *Whicker v. Hume*, 7 H. L. C. 124, 156, 157.

These cases were no doubt decided in reference to the law as it stood before 1861, but (at any rate, when there is no change of domicil) the Act of 1861 does not, it is submitted, affect the matter.

(a) See *Foreign Wills Acts*, App., Note IX.

(b) *Thornton v. Curling*, 8 Sim. 310.

admitted to probate in solemn form—but there was a doubt whether the provisions were valid according to the testator's *lex domicilii*—the law was thus laid down.

“A probate is conclusive evidence that the instrument was proved testamentary according to the law of this country. But it proves nothing else. This may be illustrated in this way. Suppose there was a country in which the form of a will was exactly similar to that in this country, but in which no person can give away more than half his property. Such an instrument made in that country by a person there domiciled when brought to probate here would be admitted to probate as a matter of course. Probate would be conclusive that it was testamentary, but it would be conclusive of nothing more, for after that there would arise the question, how is the court that is to administer the property to ascertain who is entitled to it? For that purpose you must look beyond the probate to know in what country testator was domiciled, for by the law of that country the property must be administered. Therefore, if the testator in the case I have supposed had given away all his property consisting of £10,000, it would be the duty of the court that had to construe the will to say that £5000 only can go according to the direction in the will, the other £5000 must go in some other channel” (c).

1. D., a British subject domiciled in England, but resident in France, makes a will, leaving his moveable property to trustees upon trusts for accumulation beyond the period allowed by Thellusson's Act. The will, in whatever form it is made, is as regards such trust invalid (d).

2. D., a British subject domiciled in France, makes a will while in England containing provisions in contravention of French law. The will is made in the form required

(c) *Whicker v. Hume*, 7 H. L. C. 124, 156, 157, per Lord Cranworth; Conf. judgment of Lord Wensleydale, *ibid.*, 165, 166.

(d) *Freke v. Lord Carbery*, L. R. 16 Eq. 461.

by French law. It is here inoperative as regards such provisions (e).

Exception 1.—Every will and other testamentary instrument made out of the United Kingdom by a British subject shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if made according to the forms required

Will made out of the United Kingdom by British subject in accordance with (1) *lex actus* or (2) law of domicile of origin.

- (1) by the law of the place where the same was made; or
- (2) by the laws then in force in that part (if any) of the British dominions (f) where the testator had his domicile of origin (g).

A will within this exception must be, first, a will "made out of the United Kingdom" (h); secondly, a will "made by a British subject"; thirdly, a will of "personal estate" (i). When these conditions are fulfilled, a will (though not duly executed according to the form required by the law of the testator's domicile) will be held to be "well executed for the purpose of being admitted to probate" (i.e., formally valid) though not made in accordance with the law of the place where the testator is domiciled, if executed according to either of the forms specified in the exception.

The following examples illustrate the effect of the exception as regards the wills of British subjects.

D., an Englishman domiciled in England, goes for 1. Form of

(e) *Thornton v. Curling*, 8 Sim. 310.

(f) See *In Goods of Lacroix*, 2 P. D. 94.

(g) This exception gives the substance of 24 & 25 Vict. c. 114, s. 1, as far as it bears on the present point. The parts of the section which refer to a change of domicile, or to a will made in accordance with the testator's *lex domicilii*, are omitted. For the words of the section, see the Act itself, *Foreign Wills Acts*, App., Note IX.

(h) For meaning of United Kingdom and British dominions, see p. 33, *ante*.

(i) The term "personal estate" certainly includes, with very insignificant exceptions, all moveables. It is a question whether, as used in 24 & 25 Vict. c. 114, it does or does not include leaseholds. See *Foreign Wills Acts*, App., Note IX.

place of
execution.

a few hours to Boulogne. Whilst there he executes a will of all his personal property, in accordance with the forms required by the law of France. The will, though not conforming to the Wills Act, 1 Vict. c. 26, is valid.

2. Form
required
by law of
domicil of
origin.

D., a British subject domiciled in Germany, is a native of the Mauritius, where he has his domicil of origin. D., when travelling in Denmark, makes a will of all his personal property, according to the form required by the law of the Mauritius. The will is valid here, even though not made in accordance with the forms required either by the law of D.'s domicil (Germany), or by the law of the country (Denmark) where the will is made.

British
subject
when not
in United
Kingdom
has choice
of three
forms

As the Foreign Wills Act (24 & 25 Vict. c. 114) does not invalidate a will made in any form which would be valid independently of the Act, a British subject can still make a valid will by following the form required by the law of his actual domicil. Hence, a British subject may possibly, when residing out of the United Kingdom, have a choice of three different forms, according to any one of which he may make a will of moveables which will be held, as far as form goes, valid in England. Thus D., a British subject born of Canadian parents, has a Canadian domicil of origin, and is actually domiciled in Germany. At the moment of making his will he is travelling in Italy. He may make a valid will of moveables in any one of three different forms, viz., the German form (*lex domicilii*), the Italian form (*lex actus*), the Canadian form (*lex domicilii originis*).

unless a
naturalised
British
subject.

If, however, D. is a *naturalised* subject, his will, if made only in accordance with the form required by the law of the place where he has his domicil of origin may very well be invalid. D., for example, is a Frenchman whose domicil of origin is French. He becomes a British subject by naturalisation. He is domiciled in Massachusetts, and is resident at Berlin, where he makes his will in accordance with the forms required by the law of the place where he

has his domicil of origin, viz., France, but not in accordance with the forms required by the law of Prussia. D.'s will is invalid. It is not made according to the forms required by the law of the country where he is domiciled (Massachusetts). It is not made according to forms required by the *lex actus* (Germany). It is made according to the forms required by the law of the place where D. has his domicil of origin (France), but this place is not "part of Her Majesty's dominions."

If, indeed, the law of Massachusetts held such a will valid when made by a British subject (*k*), it might be good as being made in accordance with D.'s *lex domicilii*, but it may pretty confidently be assumed that the courts of Massachusetts would not hold the will valid, and that, therefore, it would not either under Rule 68 (*l*) or within the exception under consideration be held valid in England.

Exception 2.—Every will and other testamentary instrument made within the United Kingdom by any British subject shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made (*m*). Will made by British subject within United Kingdom in accordance with *lex actus*.

A will within this exception must be, first, a will "made within the United Kingdom;" secondly, the will of a "British subject"; thirdly, a will of "personal estate." If these conditions are satisfied a will (though not duly executed according to the law of the testator's domicil) will

(*k*) See *In Goods of Lacroix*, 2 P. D. 94, where a will made by a Frenchman, naturalised in England but domiciled in France, was, though made in the English form, held valid on the ground that the French courts (*lex domicilii*) held such a will good in the case of a British subject.

(*l*) See p. 294, *ante*.

(*m*) Substance of 24 & 25 Vict. c. 114, s. 2. See for the whole of the section, *Foreign Wills Act*, App., Note IX.

be held to be well executed, and will be admitted to probate (*i.e.*, will be held formally valid) if executed "according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made." Thus, a British subject may, when within the United Kingdom, make a will which will be held duly executed if he makes it either according to the form required by the law of the country where he is domiciled, *e.g.*, Mauritius, or according to the form required by the law of the country where the will is made, *e.g.*, Scotland.

A will, it should be noticed, which falls within these exceptions, though it must be held by an English court to be duly executed, or free from any formal defect, may still, as before the Act of 1861, be invalid, either because the testator is, according to the law of his domicile, incapable of making a will, or because the will is materially invalid or inoperative as containing provisions contravening the law of the testator's domicile.

(iii.) *Interpretation of Will.*

Rule 70.

Inter-
pretation
of will.

RULE 70.—Subject to the exception hereinafter mentioned, a will of moveables is, in general, to be interpreted with reference to the law of the testator's domicile.

This rule bears upon two somewhat different cases.

First.—Where the testator uses technical terms of law, and these terms have by a rule of law a definite meaning attached to them by the law of his domicile, his will must be interpreted with reference to such rule of law.

Secondly.—Where he uses terms the meaning of which is not governed by a rule of law, such as names of measures, weights, money, &c., it is reasonable to presume, in the absence of ground to the contrary, that he meant the

measures, weights, &c., known by these names in the country where he was domiciled.

Except, however, in the cases in which the construction of a will is governed by an absolute rule of law, the maxim that the terms of a will should be construed with reference to the law of the testator's domicil, is a mere canon of interpretation, which should not be adhered to when there is any reason, from the nature of the will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country.

Exception.—Where a will is expressed in the technical terms of the law of a country where the testator is not domiciled the will should be construed with reference to the law of that country.

Will expressed in technical language of country not testator's domicil.

There are, at least, two different cases to which the principle of this exception applies (*o*).

First.—When a will is expressed in the technical terms of the country where it is executed, the presumption is that the testator had reference to the law of the place of execution, and the will, therefore, should be construed with reference to that law (*p*). Thus D., domiciled in England, but living in France, executes a will there in French, which is expressed in all the technical terms of French law. Such a will ought, it is conceived, to be interpreted with reference to French law.

Secondly.—When a will is expressed in the technical terms of the country where it is to be carried into effect, the presumption again is that the testator had reference to the law of the country where the will was to be carried into effect, and the will, therefore, should be construed with reference to that law.

Thus D., an Englishman domiciled in France, executes a will there, leaving his money on English trusts to be executed in England. The will is expressed in the technical

(*o*) See 1 *McLaren*, ss. 63, 67.

(*p*) *Ibid*.

terms of English law. There cannot, it is conceived, be a doubt that the will must be interpreted with reference to English law (*q*).

(iv.) *Effect of Change of Testator's Domicil after Execution of Will.*

Rule 71. **RULE 71.**—Subject to the possible exception hereinafter mentioned, no will or other testamentary instrument shall be held to have been revoked or to have become invalid, nor shall the construction thereof be altered by reason of any subsequent change of domicil of the person making the same (*r*).

Effect of
change in
domicil.

A testator may execute his will when domiciled in France, and may die when domiciled in England. If this is so, the question arises whether the validity of the will depends on the law of France, or on the law of England. It is to a case of this kind that the present rule applies. The rule which reproduces the third section of the Foreign Wills Act, 24 & 25 Vict. c. 114, embodies a change in the law.

Up to 1861 our courts seem to have held (*s*) (as appears still to be maintained by the courts of those parts of the

(*q*) 1 *McLaren*, s. 63, and (Scotch cases) *Cameron v. Mackie*, 19 May, 1831, 9 Sh. 601; *Norton v. Menzies*, 4 June, 1851, 13 D. 1017.

(*r*) Foreign Wills Act, 24 & 25 Vict. c. 114, s. 3.

I have assumed that this section of the Act applies to the wills of aliens no less than of British subjects. This is not certain, as it may be argued from the title and the other sections of the Act, that the third section, though general in its terms, applies only to the wills of British subjects. The interpretation, however, I have put upon the third section is consistent with its language, and is, I believe, correct. See, for summary statement of effect of change of domicil, note (*k*) at end of chapter, p. 316 *post*.

(*s*) The law before 1861 as to the effect of a change of domicil on the validity of a will was not free from doubt. Compare *Story*, s. 479*g*, with *Westlake*, s. 326.

United States where the English common law prevails (*s*) that a will invalid in point of form by the law of the country where the testator dies domiciled is to be held invalid, even though perfectly valid according to the law of the place where the will was executed. Thus, if D. made, while domiciled in France, a holograph will in the form required by the law of France, but not duly executed according to the English Wills Act, and afterwards died domiciled in England, his will was before 1861 held invalid here (*t*). The enactment embodied in the rule was passed to remedy the inconveniences or remove the doubts arising from this state of the law.

As the Foreign Wills Act, 24 & 25 Vict. c. 114, applies to all wills made by persons who die after 6th August, 1861, and as the third section of the Act applies to the wills both of aliens and of British subjects, it is clear that a will made by a person capable of making it by the law of his domicile at the time of its execution, and made in the form required by such law, will not now be treated by any English court (*u*) as invalid, either because the testator was under a testamentary incapacity by the law of the place where he died (in which case the law seems to have been the same before the Act as it is now), or because the will is not made in the form required by the law of such place. It is also clear that all questions of interpretation must be dealt with exactly as they would have been dealt with had the testator not changed his domicile.

1. D., when domiciled in France, makes a holograph will of moveables valid by the law of France, but not signed by the witnesses required by the English Wills Act. D. afterwards becomes domiciled in England and dies there. D.'s will is valid.

(*s*) See *Story*, s. 479g, citing *Natt v. Coon*, 10 Miss. 543. See *Dupui v. Wurts*, 53 N. Y. 556; *Moultrie v. Hunt*, 23 N. Y. 394.

(*t*) In the converse case of an Englishman making his will in England and dying domiciled in France inconvenience would not arise, since continental courts maintain the principle *locus regit actum*, or, as applied to the present case, that a will is formally valid if made according to the forms required by the law of the place of execution.

(*u*) or by any court throughout the British dominions.

2. D., a married woman, makes a will of moveables in Massachusetts, where she has testamentary capacity. Her husband, who, at the time of the execution of the will is domiciled in Massachusetts, afterwards settles with his wife in England and acquires a domicile there. While he is so domiciled his wife dies. Her will is valid.

3. D., a man domiciled in Scotland, makes a will of moveables there and then marries. After his marriage D. becomes domiciled in England. By the law of England a marriage revokes a will made before marriage. By the law of Scotland marriage does not revoke a will made before marriage. D. dies domiciled in England. D.'s will is valid (x).

How far
change of
domicil
may make
will valid.

Question.—Can a will, which is invalid by the law of the testator's domicile at the time of its execution, be rendered valid by his subsequent change of domicile?

As we are concerned only with the rules of law applied by English courts, the question raised is, whether our courts will or will not, under all circumstances, hold a will invalid because it was invalid by the law of the testator's domicile at the time of its execution? This inquiry can arise only on the supposition that the will, though invalid by the law of the testator's domicile at the time of its execution, would be (but for the possible effect of that law) valid by the law of the testator's domicile at the time of death.

Probable
answer to
question.

The answer to the inquiry, granting the existence of this supposed state of facts, is in no way affected by the Foreign Wills Act, 24 & 25 Vict. c. 114, and is probably different according as the testator dies domiciled in England or in a foreign country.

1. Where
testator
domiciled
in Eng-
land.

First.—Where the testator, having made his will in another country, dies domiciled in England, the view our courts will take of the will depends, it is conceived, on the cause of its invalidity under the law of the testator's domicile at the time of execution.

(x) *In Goods of Reid*, L. R. 1 P. & M. 74.

The *capacity* of a testator to make a will must be determined by the law of his domicile at the time the will is made. "The law of the actual domicile of the party at the time of the making of his will or testament was," it has been laid down on high authority, "to govern as to that capacity or "incapacity" (y). Hence, if the testator is incapable of making a will by the law of his domicile at the time of its execution, his will must, it would seem, be invalid at the time of his death. D. is domiciled in a country where infancy ends at twenty-five, and infants are under testamentary incapacity. D. makes a will at the age of twenty-two, and when twenty-five acquires a domicile in England, and dies there. D.'s will would probably be held invalid by our courts.

The *form* of a will is perhaps to be determined by the law of the testator's domicile at the time of his death (z). If, therefore, the will was invalid only for want of the form required by the law of the testator's domicile at the time of its execution, the will might perhaps, under the circumstances supposed, be held valid. D., domiciled in Italy, executes a will according to the forms required by the law of England, but not in accordance with the formalities required by the Italian law. D. becomes domiciled in England and dies there. The will is possibly valid (a).

The *material* or intrinsic validity of a will depends on the law of the testator's domicile at the time of his death.

"There is a universal agreement in referring to the law "of domicile at death, as opposed to that of the domicile "when the will was made, all questions of its intrinsic "validity: as of the proportion of his estate of which the

(y) *Story*, s. 465. Approved by *Phillimore*, s. 863. See, however, *Savigny*, s. 377, pp. 232—235.

(z) *i.e.*, where, as in the case under consideration, 24 & 25 Vict. c. 114 does not apply.

(a) That this would be the view taken by English courts seems to be indirectly shewn by 24 & 25 Vict. c. 114, ss. 1 and 2, under which the validity of a will made by a British subject is certainly as to form independent of the law of his domicile at the time of the execution of the will.

deal with
moveables
in Eng-
land ;

Hence the representative, under foreign law (who may be shortly termed the foreign representative), of a person dying domiciled abroad has no legal right to deal with moveables in England until he has taken out letters of administration or obtained probate here (*f*).

(2) move-
able estate
in Eng-
land to be
admini-
stered ac-
cording to
English
rules of
adminis-
tration ;

(2.) The moveable estate in England of the deceased person must in all cases be administered in the mode prescribed by the law of England. Thus the person to whom administration is granted by the Court of Probate is by statute bound to administer the estate and pay the debts of the deceased. The letters of administration direct him to do so, and he takes an oath that he will well and truly administer all the goods of the deceased as far as his goods extend, and will exhibit a full and true account of his administration. These duties must be performed no less in the administration of the estate of a person who has died domiciled in a foreign country than in the administration of the estate of a person who has died domiciled in England (*g*).

(3) admin-
istration in
general
granted to
foreign
representa-
tive of per-
son domi-
ciled
abroad ;

(3.) When the foreign representative of a person dying domiciled abroad has established his title under the law of the foreign domicile to represent the deceased, English tribunals will in general grant to such representative English letters of administration, so as to enable him to get possession of the deceased's moveables in this country, and will, at the same time, revoke any grant of administration which has been made to other persons in England. The principle, in short, of our law with regard to a deceased foreigner's moveables in England is, that while in administering the deceased person's estate the English rules of administration must be followed, all matters touching the right of succession to his estate must be determined by the law of his domicile, and ought, as far as possible, to be

(*f*) *Preston v. Lord Melville*, 8 Cl. & F. 1. Compare, however, as to the effect in England of Scotch confirmations, 21 & 22 Vict. c. 56, s. 12, and of Irish probates, 20 & 21 Vict. c. 79, s. 95.

(*g*) 1 *Williams' Executors* (6th ed.), p. 416.

left to the decision of the court of his domicile. Thus, "all questions of testacy or intestacy belong to the judge of the domicile. It is the right and duty of that judge to constitute the personal representative of the deceased. To the court of the domicile belong the interpretation and construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator is the prerogative of the judge of the domicile. In short, the court of the domicile is the *forum concursus* to which the legatees under the will of a testator, or the persons entitled to the distribution of the estate of an intestate, are required to resort" (*h*). These expressions of Lord Westbury must, however, be understood in a restricted sense. While English courts, from obvious motives of expediency, hold it on the whole best that rights under the law of a deceased person's domicile should be decided by the court of the domicile, the only point of principle is that these rights should be determined in accordance with the law of the domicile, and a court of this country in which an administration suit has been instituted must, it is apprehended, unless the point in dispute has been already decided by the court of the domicile, determine for itself what, *according to the law of the domicile*, is the true construction of a foreign testator's will, and what are the rights of the parties claiming to be interested in the estate of a testator or intestate domiciled in a foreign country (*i*).

(4) When all the other duties of administration, such as the payment of a deceased person's debts, are performed, the final duty of the administrator is to distribute the surplus of the deceased's moveable property amongst the persons entitled to it. In the case of a deceased person dying domiciled abroad, the duty of an English adminis-

(4) English administrator to distribute moveables to persons entitled under law of domicile.

(*h*) *Enohin v. Wyllie*, 31 L. J. (Ch.), 402, 405, *per* Lord Westbury.

(*i*) See in reference to the expressions of Lord Westbury in *Enohin v. Wyllie*, 31 L. J. (Ch.) 402, 405; 1 *Williams' Executors* (6th ed.), p. 657, note (*e*).

trator is either to distribute the surplus among the persons beneficially entitled to it according to the law of the domicile, or to remit it to the representative of the deceased under that law, to be so distributed by him (*k*).

(*k*) CHANGE OF TESTATOR'S DOMICIL AFTER EXECUTION OF WILL.—The effect of such change in respect of testamentary capacity, formal validity, and material validity, may be thus summarised :—(1) *Testamentary capacity or incapacity*, depending on the law of the testator's domicile at the time of executing the will, is unaffected by his change of domicile (*Story*, s. 465 ; 24 & 25 Vict. c. 114, s. 3). (2) The *formal* validity of a will is in general unaffected by a change of domicile (24 & 25 Vict. c. 114, s. 3), but possibly a will in accordance with the forms of the testator's domicile at his *death* may be valid though not in accordance with the forms required by the law of the testator's domicile at the time of its *execution* (see p. 311, *ante*). (3) The *material* validity of a will depends wholly on the law of the testator's domicile at the time of his death, and may therefore be affected by a change of domicile (see pp. 310, 312, *ante*).

CHAPTER XII.

LEGACY AND SUCCESSION DUTY (a).

RULE 73.—The right of the Crown to legacy Rule 73.
 duty or to succession duty in respect of a deceased Legacy or
 person's moveables, wherever actually situated, succession
 depends, in general, upon the domicile of the de- duty de-
 ceased person at the time of his death (b). pendent on
deceased
person's
domicil.

The Acts creating legacy duty (c) and succession Liability
 duty (d) impose a tax on the property of deceased persons to duty de-
 at the moment of its devolution. The general rule is that pends on
domicil.

(a) *Hanson* (3rd ed.), pp. 16, 17, 22, 219—227.

Flood, pp. 610—616.

In re Ewin, 1 C. & J. 151.

Attorney-General v. Forbes, 2 Cl. & F. 48.

Thomson v. Advocate-General, 12 Cl. & F. 1.

Re Lovelace, 4 De G. & J. 340.

In re Capdevielle, 2 H. & C. 985, 33 L. J. (Ex.) 306.

In re Badart's Trusts, L. R. 10 Eq. 288.

In re Wallop's Trusts, 1 De G. J. & S. 656, 33 L. J. (Ch.) 351.

Wallace v. Attorney-General, L. R. 1 Ch. 1.

Lyall v. Lyall, L. R. 15 Eq. 1.

Attorney-General v. Campbell, L. R. 5 H. L. 524.

Re Cigala's Trusts, 7 Ch. D. 351.

Thompson v. Birch, cited *Hanson* (3rd ed.), p. 226.

(b) See *In re Ewin*, 1 C. & J. 151; *Attorney-General v. Napier*, 6 Ex. 217, 20 L. J. (Ex.) 173; *Thomson v. Advocate-General*, 12 Cl. & F. 1; *Wallace v. Attorney-General*, L. R. 1 Ch. 1.

(c) For an account of these Acts see *Hanson* (3rd ed.), pp. 9—15. As regards Great Britain the Duty depends on 36 Geo. 3, c. 52, and 55 Geo. 3, c. 184. As regards Ireland the Legacy Duty depends on other Acts, as to which see *Hanson* (3rd ed.), pp. 40—42.

(d) 16 & 17 Vict. c. 51.

if the deceased owner dies domiciled in the United Kingdom his moveable property is chargeable with one or other of these duties, and that on the other hand, if he does not die domiciled in the United Kingdom, his moveable property is, in general, not chargeable with either of these duties. The rule that liability to duties of succession (whether in the form of legacy or of succession duty) depends on the deceased owner's domicile, has received at least three different explanations.

First explanation:
mobilia sequuntur personam.

First.—The rule is justified or explained by reference to the doctrine *mobilia sequuntur personam* (e). Acts of Parliament, it is said, are meant to impose duties on property situated within the United Kingdom; but moveable property is (by a fiction of law) considered to be situated wherever the owner is domiciled. If, therefore, the owner is domiciled within the United Kingdom, his moveables are situated in the United Kingdom, and, therefore, are subject to duty. If the owner is not domiciled in the United Kingdom his moveables are not situated there, and are not subject to duty.

This view does not really, it is conceived, explain the matter calling for explanation. For the point to be made clear is, why it is that in a particular case moveables are treated as subject to the law not of the country where they are situated, but of the owner's domicile, and the maxim *mobilia sequuntur personam* being merely a short form of stating the fact that moveables are for some purposes treated, whatever their actual situation, as subject to the law of their owner's domicile, cannot serve as an explanation of the reason why in any particular case they are so treated. The general statement of a fact cannot, that is to say, explain part of the fact which it states.

Second explanation:
Acts apply

Secondly.—The rule in question is sometimes rested on the ground that some limit must be placed on the class of

(e) See *Hanson Legacy and Succession Duty* (3rd ed.), pp. 16, 17, 219—228. Mr. Hanson's work contains an admirable statement of the cases and law with regard to the effect of domicile on liability for duties of succession.

persons to whom the acts in question are intended to apply. The enactments are not intended to apply to all the world, and the most natural assumption is, it is argued, that the persons intended to be within their scope are persons domiciled in England (*f*). There is, perhaps, some difficulty in seeing why the particular limitation of domicile should necessarily have been adopted; and, further, if succession taxes are looked upon as taxes on persons rather than on property, why such a tax should affect the real property of a person domiciled in a foreign country. This view also, whatever its worth, does not explain the exceptional cases in which the moveables of a person not domiciled in the United Kingdom are liable to succession duty (*g*).

Thirdly.—It is according to a third view maintained that duties are imposed on the property, and on that property only which the legatee or distributee, or (to use a general term) the successor, obtains under and by application of British (*h*) law (*i*). It being granted that succession to moveables is governed by the law of a deceased owner's domicile, this explanation seems at first sight to suggest what is notoriously not the case, that the succession to the moveables of a person dying domiciled, *e.g.*, in France, is never liable to any duty of succession since such a person makes out his title to the moveables in England under French law. This conclusion, however, does not really follow from the view under consideration. The very point of this view is that the successor to a person domiciled abroad may succeed to moveables in England, either in virtue solely of the foreign law, as where a successor to a French intestate dying domiciled in France claims moveables in England as next of kin under French law, or in

only to persons domiciled in United Kingdom.

Third explanation: Test of liability whether moveables claimed wholly under law of domicile.

(*f*) *Wallace v. Attorney-General*, L. R. 1 Ch. 1; *Westlake*, s. 320.

(*g*) See exception to Sub-Rule 4, p. 322, *post*.

(*h*) British is intended to include English, Irish, and Scotch.

(*i*) *Attorney-General v. Campbell*, L. R. 5 H. L. 524, 529, 530. *In re Cigala's Trusts*, 7 Ch. D. 351, 354. Remark of Jessel, M.R.

virtue in part, at least, of the ordinary rules of English law, as where such successor claims moveables in England in virtue of an English settlement, and, therefore, not under French law; and that in the first case the successor is not, whilst in the second he is, or may be, liable to succession duty.

The third explanation, if logically not quite satisfactory, has at any rate the advantage of explaining the cases to which the general rule does not apply. They are all, it will be found, cases where successors claiming property in the United Kingdom cannot make out their claims solely by recourse to the law of the deceased person's domicile (*k*).

The operation of the general rule in the case of legacy duty and of succession duty respectively is seen from the following sub-rules.

Moveables
when liable
to legacy
duty.

SUB-RULE 1.—Moveables, wherever actually situated, which belong to a person dying domiciled in the United Kingdom, are (if otherwise chargeable) liable to legacy duty (*l*).

D. died resident in India, but domiciled in England. All D.'s moveable property was, with the exception of £92, situated in India. A., his administratrix, took out letters

(*k*) No theory, it is conceived, quite satisfactorily accounts at once for the rule that the deceased person's domicile is the test of the successor's liability to duties of succession, and for the admitted exceptions to the rule in the case of succession duty. The suggestion may, perhaps, be hazarded that there was originally no good ground for making domicile the sole test of liability, and that could the whole matter now be considered without reference to past decisions, our courts might probably hold that all duties of succession fall both on the moveables of deceased persons domiciled in England, and on the moveables in England of deceased persons wherever domiciled. The exceptional cases in which the moveables of persons not domiciled in England have been held liable to succession duty are, it is conceived, the result of the just feeling on the part of the courts that the domicile of a deceased person is not in all cases a satisfactory test of a successor's liability.

(*l*) *In re Ewin*, 1 C. & J. 151.

Attorney-General v. Napier, 6 Ex. 217, 20 L. J. (Ex.) 173.

of administration in Bombay, and invested there the money she received as administratrix. She afterwards, in order to obtain the £92, took out letters of administration in England. She was held liable to pay legacy duty on the whole of D.'s moveable property (*m*).

SUB-RULE 2.—Moveables, wherever actually situated, which belong to a person dying domiciled out of the United Kingdom, are not liable to legacy duty (*n*). Moveables when not liable to legacy duty.

D. dies domiciled in Demerera, possessed of moveable property situated in Scotland. The property is not liable to legacy duty (*o*).

SUB-RULE 3.—Moveables, wherever actually situated, which belong to a person dying domiciled in the United Kingdom, are (if otherwise chargeable) liable to succession duty (*p*). Moveables when liable to succession duty.

D., domiciled in England, leaves property consisting of English consols, French *rentes*, and Indian railway shares. D. dies intestate and his property devolves on A., his nephew. A. takes out letters of administration. The whole property is liable to succession duty.

(*m*) *Attorney-General v. Napier*, 6 Ex. 217, 20 L. J. (Ex.) 173.

If a person dies domiciled in the United Kingdom his moveables, wherever situated, are liable to legacy or succession duty; but in respect of property situated out of the United Kingdom the liability cannot, it is conceived, be enforced unless either the property is situated, or brought, here, or administration is taken out here. D., a Frenchman domiciled in England, possesses money in the French funds. He leaves it to A., resident and domiciled in France, and appoints A. his sole executor. There is, it would seem, no mode in which A. can be compelled to pay duty. See this case suggested, *Flood, Wills of Personal Property*, p. 611.

(*n*) *Thomson v. Advocate-General*, 12 Cl. & F. 1.

(*o*) *Ibid.*

(*p*) See *Wallace v. Attorney-General*, L. R. 1 Ch. 1.

This case, which exemplifies the converse of Sub-Rule 3, implies that Sub-Rule 3 is correct.

Moveables
when not
liable to
succession
duty.

SUB-RULE 4.—Subject to the exception herein-after-mentioned, moveables, wherever actually situated, which belong to a person dying domiciled out of the United Kingdom, are not liable to succession duty (*q*).

D., domiciled in Natal, left his property to A., also domiciled in Natal. A. bequeathed all her property to B. A., under the will of D., was entitled to English stock, to which B., under A.'s will, also became entitled on the death of A. It was held that the stock was not liable to succession duty (*q*).

"The consideration of" [the difficulties which may be suggested] "has satisfied me," says Lord Cranworth, "that the only safe way of solving this question, as that relating to legacy duty, is to consider the duty as imposed only on those who claim title by virtue of our law. . . . The ground on which my opinion rests is that to the generality of the words in the second section (*r*), under which a duty is imposed upon every person who becomes entitled to property on the death of another, some limitation must be implied, and that limitation can only be a limitation confining the operation of the words to persons who become entitled by virtue of the laws of this country" (*s*).

Moveables
liable
which
claimed
under Eng-
lish law.

Exception to Sub-Rule.—The moveables of a person dying domiciled out of the United Kingdom are liable to succession duty if the successor claims them by virtue of an English, Scotch, or Irish trust or settlement, and therefore under English, &c., law (*t*).

(*q*) *Wallace v. Attorney-General*, L. R. 1 Ch. 1; *Jeyes v. Shadwell*, *ibid.*, 2.

See remarks on this case in judgment of *Romilly, M.R.*, *Lyall v. Lyall*, L. R. 15 Eq. 1, 10—12.

(*r*) 16 & 17 Vict. c. 51, s. 2.

(*s*) *Wallace v. Attorney-General*, L. R. 1 Ch. 1, 8, *per Cranworth, C.*

(*t*) See *In re Wallop's Trusts*, 33 L. J. (Ch) 351, 1 De G. J. & S. 656; *In re Lovelace's Settlement*, 4 De G. & J. 340; *Attorney-General v. Campbell*, L. R. 5 H. L. 524; *In re Badart's Trusts*, L. R. 10 Eq. 288; *Lyall v. Lyall*, L. R. 15 Eq. 1; *In re Cigala's Settlement*, 7 Ch. D. 351.

If D. dies domiciled in a country not forming part of the United Kingdom, *e.g.*, France, leaving moveables in England to which A. succeeds, A. is in general not chargeable with succession duty, since A.'s claim to D.'s moveable property is in general governed wholly by French law, and he succeeds to D.'s moveables wholly in virtue of French law. It may, however, happen that A.'s claim to succeed depends, according to the view of the matter taken by our courts, in part at least, upon the rules of English law. If A. succeeds under circumstances which make it necessary for him to make out his claim under the rules of English law and to invoke the aid of our tribunals, he is chargeable with succession duty (*x*). The difference in character between cases within the rule and cases within the exception may be seen from the following illustration:—

D., on his marriage with M., enters in England into an English settlement, under which £1,000 in the English funds is vested in English trustees upon trust to pay the same on D.'s death to his children. D. dies domiciled in France after the death of M., leaving only one child, A. D. leaves £10,000 in the French funds. A., as the sole representative of D., succeeds to the £10,000 and to the £1000. On the £10,000 no succession duty is payable. A. claims it as D.'s successor under the law of France. The law of England has nothing whatever to do with it, and the result would be the same even were the £10,000 invested in the English funds, or lying at an English bank, since our courts would hold that succession to it depended wholly on French law. The case of the £1,000 is different. A. no doubt succeeds to it upon the death of D., who is domiciled in France, but he succeeds to it under an English settlement and in virtue of English law; and to obtain it he must have recourse to English tribunals (*y*). He is, therefore, liable to pay succession duty on it. Whether the distinction between the two cases is at bottom sound may

(*x*) *In re Cigala's Settlement*, 7 Ch. D. 351, 354, remark of Jessell, M.R.

(*y*) See *Lyall v. Lyall*, L. R. 15 Eq. 1.

possibly be doubted. But the distinction is (it is conceived) clearly drawn by our courts and gives rise to the exception now under consideration. The principle of this exception, viz., that where a successor claims by virtue of British (a) law he is liable to succession duty, has been extended, so as to cover three different classes of cases.

1st Case :
Succession
under Eng-
lish will or
settlement.

First Case.—Where there is a succession to moveable property situated in the United Kingdom, under the will of a person domiciled out of the United Kingdom, who has a mere power under an English settlement or will of disposing of the property, the property is liable to succession duty (b).

An Englishman domiciled in England leaves £5000 in the funds in trust to pay the interest to his daughter for life, and on her death to pay over the fund to such persons as she may by will appoint. D., the daughter, marries a person domiciled in Jersey, and herself dies there domiciled. She leaves the money in question to her husband, who, at the time of her death, is domiciled in Jersey. The £5000 is liable to succession duty (c).

Under an English marriage settlement money is assigned to trustees to hold upon certain trusts during the lives of D. and M., and, further, on the death of the survivor upon such trusts as D. should by deed or will appoint. D. and M. are at the time of their marriage British subjects domiciled in England. After the marriage they acquire and retain till the end of their lives a domicile in France. D. exercises the power of appointment in favour of A. and B., French subjects domiciled in France. On the succession of A. and B., the property is liable to succession duty (d).

(a) British is used as a convenient term to express English, Scotch, and Irish. The rules applicable to an English apply to a Scotch or Irish will or settlement.

(b) *In re Wallop's Trusts*, 33 L. J. (Ch.) 351, 1 De G. & S. 656; *In re Lovelace's Settlement*, 28 L. J. (Ch.) 489, 4 De G. & J. 340.

(c) See *In re Wallop's Trusts*, 33 L. J. (Ch.) 351, 1 De G. & S. 656.

(d) *In re Lovelace's Settlement*, 28 L. J. (Ch.) 489, 4 De G. & J. 340.

The principle of both these cases is the same. The appointees are held to succeed to the moveable property of D., not in virtue of the will of D., who is domiciled out of the United Kingdom, but in virtue of the original will or settlement which gave D. the power of determining who should succeed to the property. "It cannot . . . be said "that appointees under a general power are not entitled by "reason of the disposition which created the power. They "derive their title through the instrumentality of the donee "of the power (D.), but they could have no title if the "disposition creating the power" [the will or settlement] "had not existed" (e).

Second Case.—Where there is a succession to moveable property bequeathed by a testator who is not domiciled in the United Kingdom, which under his will is invested by his executors in England under certain trusts, and it subsequently devolves on successors claiming under his will, the property is liable to succession duty (f). 2nd Case :
Succession
to move-
able pro-
perty in-
vested
under will
in Eng-
land.

D., domiciled in Portugal, appoints executors and directs them to collect his property in Portugal, pay certain legacies to A. and others, and invest the residue in English three per cents, appropriating a part to purchasing a life annuity for M., which part is, on M.'s death, to devolve on B. No legacy duty is payable by A. or M., but succession duty is payable by B. (g).

The difference between the position of A. and of B. is noticeable.

A.'s case falls under the general principle of Sub-Rule 4(h), and not under the exception. He, therefore, pays no duty. B.'s case falls within the exception. The money is invested in English funds, and though B.'s title originates in a will made by D., domiciled in a foreign country, B.'s succession to the property is a succession under English law. B., therefore, pays succession duty.

(e) *In re Lovelace's Settlement*, 28 L. J. (Ch.) 489, 495, 496, per *Knight Bruce*, L.J., 4 De G. & J. 340.

(f) *Attorney-General v. Campbell*, L. R. 5 H. L. 524.

(g) *Ibid.*

(h) See p. 322 *ante*.

LEGACY AND SUCCESSION DUTY.

The position of B. has been explained as follows :—

“In order to have the personal property administered
 “you must seek the forum of that country where the
 “person whose property is in question had acquired a
 “domicil. Then, when you obtain possession of that pro-
 “perty, you do all which has to be done in the country to
 “which the testator belonged. The question is afterwards,
 “when the property has been so obtained and administered,
 “and is in the state in which the testator desired it to be
 “placed, in what condition do you find the fund? You
 “find it in the condition of a settled fund. That condition
 “arises no doubt from the operation of the testator’s will;
 “but I can see no difference, in consequence of that circum-
 “stance, from its having arisen in any other manner, as, for
 “instance, from a deed executed in his lifetime, as might
 “have been the case, or, supposing he had transmitted to
 “his bankers a sum of money to be invested upon the
 “same trusts. When there is any fund standing in this
 “country in the names of trustees in consols or other
 “property which has a *quasi*-local settlement, which stock
 “in the funds has, all the dividends having to be received
 “in this country, and the persons who have to be dealt with
 “in respect of it being persons residing in this country,
 “that fund is subject to succession duty. The settlement
 “provides for the succession, and the interest of each person
 “on coming into possession is liable to the payment of
 “duty upon that interest to which he so succeeds” (h).

“If a man dies domiciled abroad possessed of personal
 “property, the question of whether he has died testate or
 “intestate, and also all questions relating to the distribu-
 “tion and administration of his personal estate, belong to
 “the judge of the domicil, and that on the principle of
 “*mobilia sequuntur personam*. His domicil sets up the
 “forum of administration. Now, apply that to the present
 “case. The legatees would resort to that forum to receive

(h) *Attorney-General v. Campbell*, L. R. 5 H. L. 524, 528, per *Hatherley* Chanc.

"their legacies, and the executors and trustees, when the residue has been ascertained, would resort to that forum to receive it. When they have received it the legacy is discharged, and all things that are incidental to the legacy cease. They receive it bound with the duty of bringing it to this country and investing it here in consols, which they are directed to hold upon certain trusts mentioned by the will. But the character of the ownership is no longer that of a legacy. The character of the ownership is under the trusts directed to be created by the will. There is, therefore, a settlement made of the property which is brought into this country and invested here in such mode of investment as gives to the property whilst it remains here the character of English property in respect of locality. That settlement so made, undoubtedly becomes subject to the rules of English law under which it is held, by virtue of which it is enjoyed, and under which it will be ultimately administered. This, therefore, is a description of ownership which falls immediately within the provisions of the Succession Duty Act" (i).

D., by a marriage settlement executed in England, assigned to trustees, all domiciled and resident in England, an English policy of assurance for £2000, and a sum of £1000 consols, and covenanted to pay the trustees £1000 within three years. The trustees held the trust funds upon trust to pay interest to D.'s wife for life, upon her death to D. for life, and upon the death of both of them to divide the funds among the children of the marriage. D. and his wife were domiciled in New South Wales. In 1850, D. by his will appointed executors in New South Wales, and directed them to collect his residuary estate and transmit it to his executors in England, who were to invest the sums transmitted in English funds, pay the income to D.'s wife for life, and after her death to divide the capital among D.'s children on their attaining twenty-one.

(i) *Attorney-General v. Campbell*, L. R. 5 H. L. 524, 529, 530, per Lord Westbury. See *In re Badart's Trusts*, L. R. 10 Eq. 288.

In 1853, D. died domiciled in New South Wales, and three months afterwards his wife died, also domiciled in New South Wales. They left one child, A., also domiciled in New South Wales.

It was held that A., *first*, was liable to succession duty on funds to which he was entitled under the settlement; *secondly*, was not liable to succession duty on the funds to which he was entitled under the will (*l*). A. was liable to duty for his succession under the settlement, since he succeeded to it in virtue of English law. He was not liable to duty in respect of the funds which he obtained under the will, since he succeeded to them under foreign law.

3rd Case :
Succession
to foreign
moveable
property
comprised
in a British
settlement.

Third Case.—Where there is a succession to moveable property comprised in a British settlement vested in trustees, subject to British jurisdiction and recoverable in a British court, the property is liable to succession duty.

In 1838, D., an Italian domiciled in Italy, married an Englishwoman. She assigned, under the English marriage settlement, property, consisting of French *rentes* and shares in Bank of France, to trustees, of whom three were Englishmen and one an Italian, upon trusts (upon the death of the husband and wife), for the children of the marriage. The Italian trustee died and an Englishman was appointed in his place. D. and his wife continued domiciled in Italy. In 1877, D., who survived his wife, died, leaving two children, A. and B., both domiciled Italians. It was held that succession duty was payable by A. and B. on all the fund coming to them under the marriage settlement (*m*).

Suggested
extension
of excep-
tion.

Under 24 & 25 Vict. c. 114, a will may be valid in England though not valid by the law of the testator's domicile (*n*). It has, therefore, been suggested that if a British subject dies domiciled abroad, and makes a will which is not valid except by the law of England, and his moveables are either locally situated here at the time of

(*l*) *Lyall v. Lyall*, L. R. 15 Eq. 1.

(*m*) *In re Cigala's Settlement*, 7 Ch. D. 351. See *Recent Cases on Domicil*, App., Note X.

(*n*) See pp. 303—303, *ante*.

his death, or are remitted here in accordance with his will, they may be liable to succession duty, in as much as the title of the persons claiming under the will depends wholly on the law of this country (*o*). The suggestion is certainly ingenious, and worth consideration. The answer to it, however, would appear to be that the successor in the case supposed does not base his title wholly on the law of this country. The validity of the will as to the testator's capacity and the nature of its provisions, would appear, as already pointed out (*p*), to depend on the law of the testator's domicile.

(*o*) *Hanson, Legacy and Succession Duty* (3rd ed.), p. 223.

(*p*) See pp. 298—303, *ante*.

APPENDIX.



NOTE I.—DEFINITION OF DOMICIL.

The object of this note is to compare the definition proposed in this work with some other definitions of domicile, and to consider what is the weight due to criticisms made by high authorities on all attempts to define domicile.

A.—*Definition proposed in this Treatise.*

A person's home or domicile, in so far as it is not determined by a direct rule of law, is here defined as "the place or country either (i.) "in which he in fact resides with the intention of residence, or (ii.) in "which, having so resided, he continues actually to reside, though no "longer retaining the intention of residence (*animus manendi*), or (iii.) "with regard to which, having so resided there, he retains the intention "of residence (*animus manendi*), though he in fact no longer resides "there; or (using the word 'abandon' in the strict sense given it "throughout these pages) as 'the place or country in which a "person resides with the *animus manendi*, or intention of residence, "'or which, having so resided in it, he has not abandoned'" (pp. 44, 47, *ante*).

Readers who wish to understand the full meaning of this definition should bear in mind the explanations of the terms residence and *animus manendi* given in the body of this work (pp. 43, 44, *ante*). Any one who does this will perceive at once that the proposed definition lays no claim to originality, but is simply an attempt to render into somewhat precise terms definitions which have been already in substance suggested by authors of eminence, such as Savigny, Story, and Phillimore. He will also perceive that this definition, in common with almost all of the received definitions of the term domicile, omits to take account of the cases in which a domicile is directly created by operation of law. This omission is intentional. To define domicile when created by operation of law would be simply to enumerate the

cases in which rules of law create what may be termed conventional domicils. These rules cannot easily be reduced to a simple formula, and the attempt to enumerate them under a general definition of domicil would needlessly embarrass the admittedly difficult attempt to explain the meaning of domicil as created by or dependent upon a person's own act. It is well, however, to bear in mind that definitions of domicil do not in general include cases of domicil created by operation of law, and that with such cases this note has no concern.

B.—Other definitions compared.

I. *Definition of Roman Law.*—"In eo loco singulos habere domicilium non ambigitur, ubi quis larem, rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, unde cum profectus est peregrinari videtur, quo si rediit peregrinari jam destitit." (*Cod. X, t. xl, l. 7.*)

This celebrated definition is, as has been remarked (see *Lord v. Colvin*, 28 L. J. (Ch.) 361, 365, judgment of *Kindersley*, V.C.), not so much a logical definition as a rhetorical description of a home. The "place" to which it applies is rather a house than a country, and its terms cannot be so twisted as to suit the domicil known to English lawyers. It includes, however, the essential constituents of a home, viz., residence and the *animus manendi*, and has the further merit of covering the cases in which domicil is retained without actual residence.

II. *Vattel's Definition.*—Domicil is "an habitation fixed in some place with an intention of remaining there always." (*Vattel, Droit des Gens, l. i. c. xix. s. 218, Du Domicile.*)

As remarked by Story, this definition is improved by substituting for the latter part of it the expression "without any present intention of removing therefrom" (see *Story*, s. 43), but even with this amendment it hardly covers the case where a domicil once acquired is retained, either by actual residence after the *animus manendi* has ceased to exist, or by the intention to reside after actual residence has come to an end.

III. *Denizart's Definition.*—The domicil of the person is "the place where a person enjoys his rights, and establishes his abode, and makes the seat of his property." (*Denizart, Art. Domicile.*)

IV. *Pothier's Definition.*—"The place where a person has established the principal seat of his residence and of his business." (*Pothier, Introd. Gén. Cout. d'Orléans, ch. 1, s. 1, Art. 8.*)

V. *Definition of French Code.*—"Le domicile de tout Français, quant à l'exercice de ses droits civils, est au lieu où il a son principal établissement." (*Code Civil, Art. 102.*)

VI. *Definition of Italian Code.*—"Il domicilio civile di una persona è nel luogo in cui essa ha la sede principale dei propri affari ed interessi."

"La residenza è nel luogo in cui la persona ha la dimora abituale." (Codice Civile Del Regno d'Italia, Tit. II. 16.)

These definitions rather lay down a rule of evidence for determining what is the place where a person is to be considered to have his domicile than define the meaning of the term. They belong to a system of law which determines a person's legal home by the existence of some one fact, such as his carrying on business in a particular place. There is much to recommend this mode of fixing a person's legal home; but it is not adopted by our courts. The Italian definition coincides, it may be noticed, with the definition propounded in this treatise, in so far as it bases the description of domicile upon the definition of residence, and, further, defines residence itself in terms not very unlike those employed in this treatise. (See p. 43, *ante*.)

VII. *Savigny's Definition*.—"That place is to be regarded as a man's domicile which he has freely chosen for his permanent abode [and thus for the centre at once of his legal relations and his business]". (*Savigny*, s. 353, p. 54.)

This definition brings into prominence exactly the point neglected by most writers, viz., the element of choice or intention. The words enclosed in brackets appear superfluous, since they point to a consequence of the place being a permanent abode.

The definition agrees in substance with that proposed in this work, but is too general in its terms to be of service, and though, if rightly understood, correct, might, at any rate as translated into English, mislead. For the expression "freely chosen," which probably only means that the residence must be a consequence of choice, whatever the motives for that choice, might give rise to the perplexities which have flowed from the use of the word "voluntary" (see pp. 144—146, *ante*), and the terms of the definition might be taken to imply (what is certainly not Savigny's intention) that an Englishman who had made up his mind to emigrate to America and settle there, acquired an American domicile by his "free choice of America as a permanent abode" before he leaves England.

VIII. *Westlake's Definition*.—"Domicil is the legal conception of residence." (*Westlake*, s. 30.)

This statement, though quite correct as far as it goes, and though containing a compressed enunciation of an important principle, hardly amounts to, and is probably not intended to be, a definition. It has the unfortunate verbal defect of identifying "residence" and "domicil," and thus rendering obscure the distinction, which Mr. Westlake himself, it is scarcely necessary to add, has thoroughly seized, between residence as a physical fact and residence combined with the mental fact of intention to reside.

IX. *Story's Definition*.—"The domicile of a person is "that place in which his habitation is fixed, without any present intention of removing therefrom." (*Story*, s. 43.)

This definition deserves particular attention, both from the celebrity of the author, and from the influence it has had on English decisions.

It may be considered to approach more nearly than any other to an approved or authorised description of domicile (see, *e.g.*, *Attorney-General v. Kent*, 31 L. J. (Ex.) 391, 396, judgment of *Martin*, B.). It has the merit of pointing to the negative nature of the intention or purpose on which domicile depends. Taken with the explanations with which it is accompanied in Story's work, it forms by no means a bad description of domicile, but Story himself probably did not intend to attempt (what he very rarely aims at) a precise definition. Looked at in that light his language would not, it is submitted, be accurate. His words hardly include the case of an Englishman resident for years abroad, yet still retaining his English domicile. It could certainly not in ordinary language be said to be a habitation from which he had no intention of removing.

X. *Phillimore's Definition*.—"A residence at a particular place, "accompanied with [positive or presumptive proof of] an intention to "remain there for an unlimited time." (*Phillimore*, s. 49.)

This definition is, except for the words printed in brackets, in substance the same as Story's. These words, however, might (it is apprehended) be with advantage omitted. They are at best superfluous, for the maxim *de non apparentibus et non existentibus eadem est ratio* is in law of universal application, and a fact which cannot be proved to exist has, for legal purposes, no existence. They, moreover, tend to confuse together the enquiry, what is the nature of the fact constituting domicile, or, in other words, its definition? with the different question, what is the evidence by which the existence of this act, when its nature is known, can be proved? It is, however, easy to conjecture what it is which has induced so distinguished a writer as Sir Robert Phillimore to introduce into his definition of domicile terms which are, to say the least, superfluous. They are probably intended to cover the cases in which a person's domicile is determined by a fixed rule of law independently of his own act. The author of the definition probably considers that in such instances the rule of law may be best represented as a rule of evidence affording positive or presumptive proof that a person to whom a domicile is assigned in a particular country by operation of law is there domiciled.

XI. *Vice-Chancellor Kindersley's Definition*.—"That place is "properly the domicile of a person, in which he has voluntarily fixed "the habitation of himself and his family, not for a mere special and "temporary purpose, but with a present intention of making it his "permanent home, unless and until something (which is unexpected, "or uncertain) shall occur to induce him to adopt some other permanent home." (*Lord v. Colvin*, 28 L. J. (Ch.) 361, 366, *per Kindersley*, V.C. See, for an unfavourable criticism on this definition, *Moorhouse v. Lord*, 32 L. J. (Ch.) 295, 298, 299, judgment of Lord *Chelmsford*.)

This definition lacks precision, and does not accurately point out the conditions under which a domicile may be retained; still, it has the great merit of fixing attention on the nature of the purpose or

state of mind on which the acquisition or maintenance of a domicile depends.

The definitions of Savigny, Story, Phillimore, and Vice-Chancellor Kindersley, though framed with different degrees of precision, each define domicile by analysing it into its essential characteristics, viz, residence, combined or connected with the intention of permanent residence or *animus manendi*. They are each, it is submitted, consistent with each other and with the definition propounded in this treatise.

C.—*Criticisms on attempts to define Domicil.*

English judges have certainly not underrated the difficulty of defining the term "domicil." Their language, on the contrary, generally points to the two conclusions, first, that a satisfactory definition of domicile is from the nature of things unattainable; and secondly, that, even if the term be definable, every attempt to obtain a serviceable definition has hitherto ended in failure.

Each of these opinions, with the grounds on which it is supported, deserve careful consideration.

The opinion that the word "domicil" does not admit of definition has been expressed by eminent judges in the following terms:

"Domicil," it has been said, means "permanent home, and if that was not understood by itself, no illustration could help to make it intelligible" (*Whicker v. Hume*, 28 L. J. (Ch.) 396, 400, *per* Lord Cranworth. Compare *Moorhouse v. Lord*, 32 L. J. (Ch.) 295, 298, language of Lord Chelmsford, and *Udny v. Udny*, L. R. 1 Sc. App. 441, 449). "Any apparent definition, such as a man's 'settled' or 'habitation,' or the like, would," it has been urged, "always terminate in the ambiguity of the word 'settled' or its equivalent, depending for their interpretation on the intention of the party, which must be collected from various *indicia*" (*Forbes v. Forbes*, 23 L. J. (Ch.) 724, 726, *per* Wood, V.C.). "With respect to these questions of domicile, there is no precise definition of that word, or any formula laid down by the application of which to the facts of the case it is possible at once to say where the domicile may be" (*Cockrell v. Cockrell*, 25 L. J. (Ch.) 730, 731, *per* Kindersley, V.C.). "I find it," says another very eminent judge, "stated in Dr. Phillimore's book that Lord Alvanley commends the wisdom of a great jurist of the name of Bynkershoek in not giving a definition of [domicil.] and certainly it is extremely difficult for any one to give a simple definition to that word" (*Attorney-General v. Rowe*, 31 L. J. (Ex.) 314, 319, *per* Bramwell, B. See also *Round, Domicil*, pp. 7, 8.

The opinion which these dicta embody is, however, in spite of the eminence of its supporters, one in which it is on logical grounds hard to acquiesce. To define a word is simply to explain its meaning, or, where the term is a complex one, to resolve it into the notions of which it consists. The two possible obstacles to definition would

seem on logical grounds to be, either that a term is of so complex a nature that language does not avail to unfold its meaning, or, in other words, that the term is in the strict sense incomprehensible, or that it connotes an idea so simple as not to admit of further analysis. Neither of these obstacles can, it is conceived, hinder the definition of the term "domicil." It is certainly not the name of any notion so complex that it cannot be rendered into language. It is certainly, again, not the name for an idea so simple as not to admit of further analysis. The expression, for example, permanent home, which is often used as its popular equivalent, is clearly a complex one, which needs and may receive further explanation.

Nor are the reasons suggested for holding that domicil is indefinable by any means conclusive. The objection often made in various forms, that any definition must terminate in the ambiguity of the word "settled" or its equivalent may be a proof that the process of definition has to be pushed farther than it has hitherto been carried, but does not show either that definitions already made are, as far as they go, inaccurate, or still less, that the attainment of a complete definition is impossible. The perfectly sound remark, again, that no formula can be laid down by the application of which to the facts of the case it is possible at once to say where the domicil may be, points not to any necessary defect in the definition of the term, but to the narrow limits within which definition, however perfect, can be of practical utility. Any term the meaning of which involves a reference to "habit" or to "intention" will always be difficult of application. No definition can ever remove the difficulty of determining in a particular case what number of acts make a course of action habitual, or what is the evidence from which we may legitimately infer the existence of intention. Difficulties similar in kind, if not in degree, to those which attend the application to the facts of the case of any definition of domicil arise whenever questions as to "possession" or as to "intention" require to be answered by the courts. The peculiar difficulty of dealing with the term "domicil" arises, it is apprehended, from its being a term the meaning of which involves a reference both to habit and to intention, while the intention, viz., the *animus manendi*, is one of a very indefinite character, and as to the existence of which the courts often have to decide without possessing the data for a reasonable decision (see pp. 114, 115, *ante*).

The admission, in fact, that domicil depends on a relation between "residence" and "the intention of residence," or, to use the words of Lord Westbury, that "domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time," (*Udny v. Udny*, L. R. 1 Sc. App. 441, 458, and compare *Bell v. Kennedy*, *ibid.*, 307, 319; *Cockrell v. Cockrell*, 25 L. J. (Ch.) 730, 731, 732; *Lyall v. Paton*, *ibid.*, 746, 739) is, it is conceived, a virtual concession that a definition of domicil is, at any rate possible. When his lordship adds that "this is a description of the

circumstances which create or constitute domicile, it is not a definition of the term," there is a difficulty in following his reasoning, for such a description, if accurate, is an explanation or, in other words, a definition of what is meant by domicile. It is, at any rate, the only kind of definition which a lawyer need care to frame.

The prevalent opinion that no attempt to define domicile has been crowned with success deserves careful consideration. For, if the opinion be well founded, the conclusion naturally suggests itself that where writers of great eminence have failed, success is practically unattainable, whilst the mere existence of the opinion in question appears, at first sight, to be something like a guarantee that it rests on sound foundations. It is worth while, therefore, to consider what are the grounds on which the belief that the existing definitions of domicile are unsatisfactory is based, and whether it be possible to find an explanation for the existence of this belief, which, without impugning the sagacity of those by whom it has been entertained, leaves its truth at least open to doubt.

English tribunals have tested every definition of domicile by what undoubtedly is, subject to one condition, the true criterion, at any rate in an English court, of the soundness of such a definition, viz., whether it includes all the cases in which it has been judicially decided that a person has, and excludes all the cases in which it has been judicially decided that a person has not, a domicile in a particular country, and it is because judges have found that no received definition has stood this test, that they have pronounced every existing definition defective, and have all but despaired of the possibility of framing a sound definition. The condition, however, of the validity of this criterion is, that the cases by which a definition is tested should be really inconsistent with the definition, and that the cases themselves should be decided consistently with generally admitted principles. For if a definition is really applicable to cases which at first sight seem inconsistent with it, or if the decisions by which it is tested are themselves in principle open to doubt, the difficulty which arises in applying the definition is in reality a strong testimony to its essential soundness. The matter, therefore, for consideration is whether the test applied to the definitions of domicile has fulfilled the condition on which its validity depends.

Definitions of domicile have made shipwreck on three distinct sets of cases which may, for the sake of brevity, be described as "Anglo-Indian Cases," "Allegiance Cases," and "Health Cases."

(i). *Anglo-Indian Cases* (see pp. 140—143, *ante*).—A series of decisions beginning, in 1790, with *Bruce v. Bruce* (2 B. & P. 229), and ending, in 1864, with *Jopp v. Wood* (4 De G. J. & S. 616), decided that an officer in the service of the Company was domiciled in India. It was as clear, in ninety-nine instances out of a hundred, as such a thing could be, that a servant of the Company did not intend to make India his permanent home (*Allardice v. Onslow*, 33 L. J. (Ch.) 434, 436, judgment of *Kindersley*, V.-C.). It was, therefore, in the strictest sense impossible that any definition which made the existence of domicile

depend on the *animus manendi* should justify the decisions as to Anglo-Indian domicil. No accuracy of terms or analysis of the meaning of the word could by any possibility achieve this result. As long, therefore, as the Anglo-Indian cases were held to be correctly decided, English judges were inevitably driven to the conclusion that every received definition of domicil, such for example as Story's, was incorrect. The courts, however, have now pronounced the Anglo-Indian cases anomalous, or, in other words, have held that these cases were in principle wrongly decided, though their effect could now be got rid of only by legislative action (*Jopp v. Wood*, 34 L. J. (Ch.) 212, 4 De G. J. & S. 616; *Drevon v. Drevon*, 34 L. J. (Ch.) 129, 134). These cases, therefore, do not fulfil the condition necessary to make them a test of a definition of domicil.

(ii). *Allegiance Cases* (see pp. 81—83, *ante*).—The doctrine was at one time laid down (*Moorhouse v. Lord*, 10 H. L. C. 272, 32 L. J. (Ch.) 295; *Whicker v. Hume*, 7 H. L. C. 124, 23 L. J. (Ch.) 396), that a change of domicil involves something like a change of allegiance, and that for instance, an Englishman, in order to acquire a French domicil, must, at any rate as far as in him lies, endeavour to become a French citizen. This doctrine was strictly inconsistent with the theory, on which the received definitions of domicil are based, that a domicil is merely a permanent home. As long, therefore, as this doctrine was maintained, it was impossible for English judges to treat as satisfactory any of the current definitions of domicil. The attempt, however, to identify change of domicil with change of allegiance has now been pronounced on the highest authority a failure (*Udny v. Udny*, L. R. 1 Sc. App. 441; *Douglas v. Douglas*, L. R. 12 Eq. 617). The allegiance cases, therefore, are not entitled to weight and are no criterion of the correctness of a definition.

(iii). *Health Cases* (see pp. 133—137, *ante*).—Dicta, though not decisions, may be cited as showing that a change of residence made by an invalid for the sake of his health cannot effect a change of domicil. This doctrine, if adopted without considerable limitations, makes domicil depend upon the motive, and not upon the intention, with which a person changes his residence. It is, therefore, inconsistent with, and throws doubts upon, the correctness of any definition of domicil depending upon the combination of residence and *animus manendi*. The doctrine, however, is now shown by the one decided case on this subject (*Hoskins v. Matthews*, 25 L. J. (Ch.) 689, 8 De G. M. & G. 13) to be either unfounded or else to be explainable in a manner perfectly consistent with the ordinary definitions of domicil.

A result, therefore, of the examination of the three sets of cases, by which definitions of domicil have been tested and found wanting, is, that no one of these sets fulfils the conditions necessary to make it the criterion of a definition, and that the difficulty which has been found in reconciling several definitions with the Anglo-Indian cases, the allegiance cases, and the health cases tell rather in favour of than against the correctness of the definitions, which, because they

could not cover these cases, were naturally thought incorrect and unsatisfactory.

A survey, in short, of the attempts which have been made to define domicile, and of the criticisms upon such attempts, leads to results which may be summed up as follows.

First.—Domicil, being a complex term, must from the nature of things be capable of definition. In other words, it is a term which has a meaning, and that meaning can be explained by analysing it into its elements.

Secondly.—All the best definitions agree in making the elements of domicile “residence” and “*animus manendi*.”

Thirdly.—Several of these definitions, such for example as Story’s, Phillimore’s, or Vice-Chancellor Kindersley’s, have succeeded in giving an explanation of the meaning of domicile, which, even if not expressed in the most precise language, is substantially accurate.

Fourthly.—The reason why English courts have been inclined to hold that no definition of domicile is satisfactory is that they have found it impossible to reconcile any definition with three sets of judicial decisions or dicta. When, however, these sets are examined, it is found that two of them consist of cases embodying views of domicile now admitted to be erroneous, whilst the third set can be reconciled with all the best definitions of domicile. The great difficulty in short which English judges have experienced in discovering a satisfactory definition, arises from the fact that when of recent years the courts have been called upon to determine questions of domicile, they have been hampered by the almost insuperable difficulty of reconciling a generally sound theory with decisions or dicta delivered at a period when the whole subject of the conflict of laws was much less perfectly understood than at present.

NOTE II.—CLASSIFICATION OF DOMICILS.

The different kinds of domicile may be classified or divided in different ways, according to different principles of division.

A. (i). *Domicil imposed by operation of law*; (ii) *domicil acquired by act of party*.—This division is exhaustive. Every domicile is, if its mode of creation be considered, either a domicile by operation of law, which is sometimes called a “necessary domicile,” or a domicile acquired by the party’s own act, which is generally called a “domicil of choice.”

(i). *Domicil by operation of Law*.—Such a domicile is one which a party receives by a rule of law, independently of any act of his own

whereby he chooses a place or country as his home. Under this head fall the domicile of origin and the domicile of all dependent persons, such as infants or married women (pp. 96—119, *ante*). Whether English law recognises any other instances of domicile by operation of law is fairly open to doubt. A lunatic (pp. 129, 130, *ante*), a convict (pp. 132, 133, *ante*), or a person in the military or naval service of the State (pp. 139—143, *ante*) cannot, it is true, in general fulfil the conditions necessary for effecting a change of domicile, but his domicile is not in strictness determined by a rule of law. It is not therefore (according to the view maintained in this work) a domicile by operation of law.

(ii). *Domicil acquired by act of Party*.—Such a domicile is one which a person acquires as the result of his own act and choice by deliberately settling in a place or country. It is technically termed a domicile of choice, and its nature and mode of acquisition have been fully described in the foregoing pages (pp. 73—96, *ante*).

B. (i) *Domicil of origin*; (ii) *domicil of choice*.—This well-known classification of domicils (pp. 67—96, *ante*) has the defect of not being exhaustive. The domicile, for example, of a married woman is neither a domicile of origin nor a domicile of choice. It is not, or need not be, the domicile she received at birth; it is not therefore a domicile of origin. It is not or need not be the place or country chosen by herself for her home; it is not therefore a domicile of choice. The assertion indeed has been made by Lord Westbury that the domicile of a wife is a domicile of choice (*Udny v. Udny*, L. R. 1 Sc. App. 441, 457), but this doctrine, though resting on high authority, must (it is apprehended) be rejected as erroneous. A woman, on her marriage, no doubt exercises an act of choice in marrying, but the legal consequence of her marriage, viz., the acquisition and perpetual retention of her husband's domicile, is the result not of choice but of a rigid rule of law, which may for legal purposes counteract the effect of a wife's choice of a home (*Dolphin v. Robins*, 7 H. L. C. 390).

C. (i) *Domicil of origin*; (ii) *domicil of choice*; (iii) *necessary domicil*.—(See *Story*, s. 49; *Phillimore*, ss. 67, 71.)—This threefold classification of domicils (which originates in a perception of the fact that the current division into domicile of origin and domicile of choice is not exhaustive) is open to several objections.

If "necessary domicil" means, as it often does, domicile by operation of law, then it ought to include, and not to be distinguished from, a domicile of origin. If "necessary domicil" means, as it sometimes appears to do, the domicile of dependent persons, such as infants or married women, then this threefold classification is merely the division

of domicils into domicile by operation of law and domicile acquired by act of party expressed in a somewhat obscure form, since the domicile of origin and the so-called necessary domicile are each the respective names for the two sub-divisions of domicile which together make up the class of domicile by operation of law.

The expression, further, "necessary domicile," is apt to cover an ambiguity of some importance. It often, as already pointed out, denotes the domicile of dependent persons; so used the term means a domicile imposed by a rule of law. It sometimes, however, denotes the domicile of prisoners, lunatics, and others who cannot in fact change their home; so used it means a domicile which, though it may not be imposed by a rule of law, cannot in fact be changed. When a wife is said to have a necessary domicile what is meant is, that though she can in fact acquire a home for herself, she cannot legally have any domicile except that of her husband. When a prisoner is said to have a necessary domicile what is meant is that he cannot change his domicile, because in fact he cannot acquire a home for himself. The word "necessary" is no doubt applicable to the domicile both of a wife and of a prisoner, but it is not applied in the same sense to the one as that in which it is applied to the other.

NOTE III.—COMMERCIAL DOMICIL IN TIME OF WAR.

A. *Person's character determined by Domicil.*

(1 *Duer on Insurance*, pp. 494—523; 1 *Kent* (12th ed.), pp. 73—81; 1 *Arnould Marine Insurance* (3rd ed.), pp. 121—134).—In time of war the answer to the question whether a person is or is not to be considered an alien enemy is, in most cases at any rate, to be determined by reference not to his nationality or allegiance, but to his trading residence or commercial domicile. Every person domiciled in a state engaged in hostilities with our own, whether he is a born subject of that state or not, is to be regarded as an alien enemy (1 *Arnould*, p. 121; *The Indian Chief*, 3 C. Rob. 12, 22); and, speaking generally, a person domiciled in a neutral country is to be regarded as for commercial purposes a neutral, even though he be, in fact, a British subject, or a subject of a state at war with England (*The Danous*, 4 C. Rob. 255 (n); 1 *Duer*, pp. 494, 495, 520). "The position is a clear one, that if a person goes into a foreign country, and engages in trade there, he is, by the law of nations, to be considered a merchant of that country, and a subject for all civil purposes, whether that country be hostile or neutral; and he cannot be permitted to retain the privileges of a

"neutral character, during his residence and occupation in an enemy's country" (1 *Kent* (12th ed.), p. 75). A person's character, in short, as a friend or enemy is in time of war to be determined by what is termed his commercial domicile. Persons who are commercially domiciled in a neutral country are, as far as belligerents are concerned, neutrals; whilst, on the other hand, persons commercially domiciled in a hostile country are, whatever their nationality or allegiance, to be considered enemies, for "persons resident in a country, and carrying on trade there, by which both they and the country are benefited, are to be considered the subjects of that country, at least so far as to subject their property to capture by a country at war with that in which they live" (*Tabbs v. Bandelack*, 4 Esp. 108, 110, *per Lord Kenyon*). Thus, if there be a war between England and France, a British subject residing and trading in France is an alien enemy, whilst a British subject or a French citizen who resides and carries on business in Portugal is, even though he may trade with France, a neutral.

B. *Nature of Commercial Domicil.*

The nature of the trading residence or commercial domicile, which determines a person's friendly or hostile character in time of war, may be made clear by comparing such commercial domicile with the domicile properly so called, which forms the subject of this treatise, and is, in this note, termed for the sake of distinction a civil domicile. Each domicile is a kind of residence, each bears a close resemblance to the other, but they are distinguished by marked differences.

I. *Resemblance of Commercial Domicil to Civil Domicil.*—A trading or commercial domicile bears so close a resemblance to a civil domicile that it is often described in language which appears to identify the two kinds of domicile. Thus Arnould writes of the domicile which determines a person's character in time of war, "that is properly the domicile of a person where he has his true fixed permanent home and principal establishment, in which when present he has the intention of remaining (*animus manendi*), and from which he is never absent without the intention of returning (*animus revertendi*) directly he shall have accomplished the purpose for which he left it" (1 *Arnould Marine Insurance* (3rd ed.), p. 121), whilst Duer states with regard to the national character of a merchant, "it is determined solely by the place of his permanent residence. In the language of the law, it is fixed by his domicile. He is a political member of the country into which by his residence and business he is incorporated; a subject of the government that protects him in his pursuits that his industry contributes to support, and of whose national resources his own means are a constituent part" (1 *Duer*, p. 495). Nor are the points in which the two kinds of domicile resemble each other hard to discern. They are each kinds or modes of residence. The constituent elements of each are, first, "residence;" secondly, a "purpose or intention" (on the part of the person whose domicile is in question) "with regard to

"residence." In spite, however, of the terms used by high authorities, and of the undoubted likeness between the two kinds of domicile, they are different in essential particulars.

II. *Differences between Civil and Commercial Domicil.*—The fundamental distinction between a civil domicile and a commercial domicile is this: A civil domicile is such a permanent residence in a country as makes that country a person's home (see p. 44, *ante*) and renders it, therefore, reasonable that his civil rights should in many instances (see p. 153, *ante*) be determined by the laws thereof. A commercial domicile, on the other hand, is such a residence in a country for the purpose of trading there as makes a person's trade or business contribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country. When a person's civil domicile is in question, the matter to be determined is whether he has or has not so settled in a given country as to have made it his home (p. 44, *ante*). When a person's commercial domicile is in question, the matter to be determined is whether he is, or is not, residing in a given country with the intention of continuing to trade there. From this fundamental distinction arise the following differences:

(i). *As to Residence.*—Residence in a country is in general *primâ facie* evidence of a person having there his civil domicile, but it is only *primâ facie* evidence, the effect of which may be quite got rid of by proof that a person has never lived in the country with the intention of making it his permanent home; but residence is far more than *primâ facie* evidence of a person's commercial domicile. In time of war a man is taken to be domiciled for commercial purposes in the country where he in fact resides, and, if he is to escape the effect of such presumption, he must prove affirmatively that he has the intention of not continuing to reside in such country. A long period further of residence, which, as regards civil rights, is merely evidence of domicile, might, it would seem, be absolutely conclusive in determining national character in time of war (1 *Duer*, pp. 500, 501; *The Harmony*, 2 C. Rob. 322).

(ii). *As to Intention.*—The intention or *animus*, which, in combination with residence, constitutes a civil domicile, is different from the intention or *animus* which, together with residence, makes up a commercial domicile.

The intention which goes to make up the existence of a civil domicile is the present intention of residing permanently, or for an indefinite period, in a given country (pp. 43—45, *ante*). The intention which goes to make up the existence of a commercial domicile is the intention to continue residing and trading in a given country for the present. The former is an intention to be settled in a country and make it one's home, the latter is an intention to continue residing and trading there. Hence, on the one hand, a person does not acquire a civil domicile by residence in a country for a definite purpose or period (pp. 80, 81, *ante*), and cannot by residence in one country, *e.g.*,

France, get rid of a domicile in another, *e.g.*, England, if he retains the purpose of ultimately returning to England as his home; while, on the other hand, the intention "which the law attributes to a person residing in a hostile country is not disproved by evidence that he contemplated a return to his own country at some future period. If the period of his return is wholly uncertain, if it remains in doubt at what time, if at all, he will be able to accomplish the design, the design, however seriously entertained, will not avail to refute the legal presumption. A residence for an indefinite period is, in the judgment of law, not transitory, but permanent. Even when the party has a fixed intention to return to his own country at a certain period, yet, if a long interval of time—an interval not of months, but of years—is to elapse before his removal is to be effected, no regard will be had to an intention of which the execution is so long deferred" (1 *Duer*, pp. 500, 501).

D., domiciled in England, goes to British India with the full intention of residing there till he has made his fortune in trade and of then returning to England, where he has his domicile of origin. He resides in India for twenty years. He retains his English civil domicile. Suppose, however, that D., under exactly similar circumstances in every other respect, takes up his residence not in British India, but in the Portuguese settlement in India, and after war has broken out between England and Portugal, continues to reside and trade in the Portuguese settlement, though still retaining his intention of ultimately returning to England. D. thereupon acquires a Portuguese commercial domicile.

(iii). *As to Abandonment.*—The rules as to abandonment are different. A civil domicile once acquired can be changed only by complete abandonment in fact of the country where a person is domiciled (*In goods of Raffeneil*, 32 L. J. (P. & M.) 203; see Rule 8, p. 86, *ante*). The intention to change, even if accompanied by steps for carrying out a change, will not, it would seem, produce a change as long as the person whose domicile is in question continues in fact to reside in the country where he has been domiciled.

A commercial domicile in time of war can, it would seem, be changed, under some circumstances, by the intention to change it, accompanied by steps taken for the purpose of effecting a change. "The native national character, that has been lost, or partially suspended, by a foreign domicile, easily reverts. The circumstances, by which it may be restored, are much fewer and slighter than those that were originally necessary to effect its change. It adheres to the party no longer than he consents to bear it. It is true, his mere intention to remove—not manifested by overt acts, but existing secretly in his own breast, . . . is not sufficient to efface the character that his domicile has impressed; something more than mere verbal declarations, some solid facts, showing that the party is in the act of withdrawing, is always necessary to be proved; still, neither his actual return to his own country, nor even his actual departure from

"the territories of that in which he has resided, is indispensable" (1 *Duer*, pp. 514, 515).

(iv). *As to Domicil by operation of Law.*—It may fairly be doubted whether the rules as to domicil by operation of law, *e.g.*, in the case of persons who have in fact no home, or of dependent persons, which play so large a part in the law of civil domicil, can be without considerable limitations applied to the ascertainment of commercial domicil. D., for example, is a French subject, whose domicil of origin is English. He has an acquired domicil in France. Both France and America declare war against England. D. thereupon leaves France, intending to settle in New York. He resumes during the transit from one country to another his domicil of origin (pp. 86—96, *ante*); but it can hardly be supposed that he is not during such transit an alien enemy. D., again, is an infant, or a married woman, carrying on a commercial business on his, or her, own account in France during a war with England. It can hardly be maintained that the fact of the father in the one case, or the husband in the other, having an English domicil and being resident in England will free D. from the character of an alien enemy.

(v). *As to Special Rules.*—There are one or two rules as to commercial domicil which can have no application to an ordinary civil domicil. Thus, according to American decisions at least, an American citizen (and the same principle would perhaps be applied by English courts to British subjects) cannot, by emigration from his own country during the existence of hostilities, acquire such a foreign domicil as to protect his trade during the war against the belligerent claims either of his own country or of a hostile power (1 *Duer*, p. 521; *The Dos Hermanos*, 2 Wheaton 76). So, again, a neutral merchant may, at any time, withdraw his property and funds from a hostile country, and such a withdrawal may restore him to his neutral domicil. But whether the subject of a belligerent state can, after the outbreak of hostilities, withdraw from a hostile state so as to escape the imputation of trade with the enemy is doubtful. If the withdrawal can be effected at all, either it must be done within a short period after the outbreak of war, or any delay in affecting it must be shown to have arisen from necessity or from compulsion (*The Diana*, 5 C. Rob. 59; *The Ocean*, *ibid.*, 90; *The President*, *ibid.*, 277; 1 *Duer*, p. 519).

C. *Person's Civil need not coincide with his Commercial Domicil.*

From the distinctions between a civil and a commercial domicil, the conclusion follows that a person may have a civil domicil in one country, and, at the same time, a commercial domicil or residence in another. Thus, suppose that D.'s domicil of origin is English, but that he goes to France and sets up in trade there without any purpose of making France his permanent home, but with the distinct intention of returning to England within ten years. He clearly retains his

English domicile of origin ; and the outbreak of a war between France and England does not of itself affect D.'s civil domicile.

If D. continues to reside and trade in France after the outbreak of hostilities, though without any change of intention as to the time of his stay in France, he will acquire a French commercial domicile. In other words, he will have a civil domicile in England and a commercial domicile in France.

Nor is this fact really inconsistent with Rule 3 (see p. 61, *ante*) that no person can, at the same time, have more than one domicile. It only illustrates the fact constantly dwelt upon in this work, that residence is different from domicile, and that a person while domiciled in one country may, in fact, reside in another.

NOTE IV.—RULES AS TO IMMOVEABLES (LAND).

A. General Principle.

The general principle of the English Common Law is that the ordinary law of the country where land or real property is situated (*lex situs*) exclusively governs the rights of the parties, the modes of transfer, and the solemnities which accompany them (*Story*, ss. 424, 428). This principle applied to land in England (with which alone this note is concerned) leads to the following results:—

(1). *As to Capacity*.—The capacity to alienate or acquire land depends wholly on the ordinary rules of English law without any reference to the law of the owner's domicile (*Story*, s. 431 ; but see *Westlake*, s. 89).

(2). *As to Restrictions on Alienation*.—These are governed wholly by the *lex situs*. Enactments against the alienation of land in mortmain or for charitable uses apply to all land in England, whatever be the domicile of the owner (*Curtis v. Hutton*, 14 Ves. 537, 541 ; contrast *Mackintosh v. Townsend*, 16 Ves. 330).

(3). *As to Forms of Alienation*.—Land in England must be conveyed according to the ordinary forms of English law (*Story*, s. 434 ; *Westlake*, s. 82).

(4). *As to Marriage*.—The mutual rights of husband and wife over each other's immoveable property in England are (independently of the effect of a settlement) regulated by the ordinary rules of English law without reference to the law of the husband's domicile, or of the country where the marriage takes place (*In goods of Gentili*, Irish L. R. 9 Eq. 541).

(5). *As to Bankruptcy*.—A bankruptcy does not transfer to the representative of the creditors any land situated out of the country where the bankruptcy takes place. Hence a bankruptcy in France or Australia does not affect the bankrupt's lands in England (*Cockerell*

v. *Dickens*, 3 Moore P. C. 98; *Williams' Bankruptcy* (2nd ed.), p. 96; *Westlake*, ss. 282, 283), and subject to the apparent exception mentioned below, the ownership of lands in England is in no way affected by a bankruptcy in a foreign country.

(6). *As to Death*.—The effect of the death of the owner of land in England on the succession to his land is, subject to the apparent exception mentioned below, governed wholly by the ordinary rules of English law without any reference to the law of his domicile. If he dies domiciled in France and intestate his freeholds descend to his heir, and his leaseholds are distributed exactly as they would be if he had died domiciled in England (*Birtwhistle v. Vardill*, 2 Cl. & F. 571; *Fenton v. Livingstone*, 3 Macq. 497; *Freke v. Lord Cumberly*, L. R. 16 Eq. 461; *In goods of Gentili*, Irish L. R. 9 Eq. 541), subject, however, to the proviso that the legitimacy of his successor, and hence indirectly the distribution of the leaseholds, may depend on the law of France (see pp. 181, 191, 192 *ante*). If he dies domiciled in France, having made a will, the validity and effect of his will in respect of real estate will be determined wholly with reference to the law of England (*Coppin v. Coppin*, 2 P. Will. 291).

B. Exceptions to General Principle.

There are one or two apparent exceptions to the general principle that land in England is wholly governed by the *lex situs*.

(i). *As to Bankruptcy*.—A Scotch (or Irish?) bankruptcy transfers to the trustee or assignee the lands of the bankrupt in England (*Williams' Bankruptcy* (2nd ed.), p. 96; 19 & 20 Vict. c. 79, s. 102 (Scotch); 20 & 21 Vict. c. 60, s. 268 (Irish)). This exception to the rule that a foreign bankruptcy does not affect lands in England is little more than apparent. A Scotch or Irish bankruptcy, as also an English bankruptcy, takes place under an Imperial Act, which affects the whole of the bankrupt's property throughout the British dominions.

(ii). *As to Wills of Chattels Real under 24 & 25 Vict. c. 114*.—Chattels real are, for most purposes, included under the rules as to immoveables. Under 24 & 25 Vict. c. 114, s. 1 (see pp. 303—305, *ante*), a British subject can, when out of the United Kingdom, make a valid will of personal estate in the form required by the law of the place where the same is made, or by the law of the place where the testator has his domicile of origin. If, therefore, D., born in the Mauritius, goes to France, he can, if the term "personal estate," as used in the Foreign Wills Act, includes chattels real (as to which there is no decided case), make a will of leasehold property in London which will be valid here, though not executed in accordance with the requirements of the English Wills Act, *i.e.*, though not complying with the *lex situs*. It must, however, be pointed out that should the validity of such a will ever come in question the courts may hold that, in spite of the use of the term personal estate, the Foreign Wills Act was intended to apply only to moveables.

NOTE V.—LEGITIMATION.

Question.—Do English courts ever admit the legitimacy of a person born out of lawful wedlock?

To this question two different answers may be given.

First Answer.—Our courts hold that the question of a child's legitimacy is to be determined by the law of the father's domicile at the time of the child's birth. Hence the child of parents domiciled in Scotland becomes, on their subsequent marriage, in strictness legitimate in England, and is held by our courts to be legitimate, though, owing to the special rules governing the descent of land in England, he cannot be heir to English real estate.

This answer, which is in accordance with the view maintained throughout this treatise is, it is apprehended, the right one, and is in conformity with expressions used by the courts in several cases (*Re Don's Estate*, 27 L. J. (Ch.) 98, 100; *Skottowe v. Young*, L. R. 11 Eq. 474, 477). But we must admit that the reported decisions are indecisive, and are compatible with a different view.

Second Answer.—Our courts do not, in strictness, admit the legitimacy of any persons born out of lawful wedlock. The Scotch cases, such as *Udny v. Udny*, L. R. 1 Sc. App. 441, are decisions as to Scotch law, and only determine that the son of a man domiciled in Scotland can, under Scotch law, be legitimated by the subsequent marriage of his parents. Nor do the cases regulating succession to moveables go further than deciding that such succession is to be regulated wholly by the law of the country where the deceased person is domiciled. Under this rule an illegitimate child may claim moveables in England if the law of his father's domicile entitles him to share in the succession (*Doglioni v. Crispin*, L. R. 1 H. L. 301). The fact, therefore, that a legitimated person may succeed to his father's moveables does not prove that our courts admit his legitimacy.

Though this second answer does not, it is conceived, fairly represent the view taken by our courts, there is, it must be admitted, no reported case which gives a decisive reply to the question raised in this note. The effect given by English tribunals to the law of a deceased person's domicile in determining the succession to his moveables, makes it in general unimportant to decide what may be the theoretical view taken by our courts as to the legitimacy of persons entitled under the law of D.'s domicile to succeed to his moveable property. If, for example, English tribunals hold that the legitimated son of a Scotch intestate dying domiciled in Scotland is entitled to succeed to his father's goods, it makes no practical difference whether English courts base his right to succeed on his legitimacy, or whether they base it on the ground that though not legitimate he is held so by the law of

Scotland, and that his right to moveables in England is governed wholly by Scotch law. Still, cases may be imagined, the decision of which must depend on the view taken by English courts as to the possible legitimacy of a person born before the marriage of his parents. D., for example, a man domiciled in Scotland, has by M. an illegitimate child C. D., after C.'s birth, marries M., and later in life becomes and dies domiciled in England without leaving a will. If C. is strictly legitimate under English law, *i.e.*, if the first suggested answer is right, he is entitled to succeed to D.'s English moveables. If C. is not strictly legitimate under English law, *i.e.*, if the second suggested answer is right, he is not entitled to succeed to D.'s English moveables. He is not entitled under English law, because he is not legitimate. He cannot make out a title under Scotch law, because D. did not die domiciled in Scotland. Two cases, *Goodman v. Goodman*, 3 Giff. 643, and *Boyes v. Bedale*, 1 H. & M. 798, each appear to raise in substance the question whether a person born out of lawful wedlock can be in England legitimated by the subsequent marriage of his parents. As, however, the decision in the first case is in favour of, and in the second is against, such person's legitimacy, neither case can be considered decisive.

The right conclusion appears to be that, while the first suggested answer is probably correct, its correctness cannot be considered free from doubt.

NOTE VI.—THEORIES OF DIVORCE.

The doctrine maintained by the courts of any country with regard to jurisdiction in matters of divorce and points connected therewith, ultimately depends upon the view entertained by such courts with regard to the nature of divorce. On this matter three different theories, depending at bottom on the different views which may be taken of marriage, have been maintained at different times and in different countries. These theories may for convenience be termed the "contractual theory," the "penal theory," and the "status theory" of divorce.

1. *The Contractual Theory.*—Marriage may be regarded mainly as a contract between the parties thereto (2 *Steph. Com.* (7th ed.), p. 240). On this view of marriage, divorce is naturally regarded as the rescission of the marriage contract, on the terms or conditions (if any) for its determination agreed upon between the parties at the time of the marriage; as, for example, that it might be put an end to on the ground of incompatibility of temper, or of the husband's desertion of the wife. Even on what may be termed the extreme contractual theory, marriage has never in modern times been put on exactly the same basis

as other agreements. The conditions of the contract, as to its rescission and otherwise, have never, in Christian countries at least, been held to be subject to variation at the will of the parties, but have always been treated as determined by the law of the country under which the marriage is made. It has further been almost universally held that a marriage can be dissolved only by public authority. Still, on the contractual view, a divorce may fairly be described as the rescission of a contract, and the right to divorce may be regarded as the right of the party aggrieved to have the marriage contract rescinded on the conditions, if any, agreed upon between the parties with reference to its rescission.

Results of Theory.—From this theory two consequences naturally ensue. First, if the parties marry under the law which, like that of England before 1858, or of modern Italy, does not recognise divorce, neither of them can have under any circumstances the right to petition for a divorce from the tribunals of any country whatever. For a person who has married, for instance, under the law of Italy, has entered into an agreement, one of the terms of which is that it shall never be rescinded. He cannot, therefore, have, in virtue of this contract, a ground for applying to the courts of any country whatever for its rescission (*Tovey v. Lindsay*, 1 Dow. 117, 131, 140). Secondly, jurisdiction in matters of divorce belongs, on this view, exclusively to the tribunals of the country under the law of which the marriage was celebrated. The latter conclusion is no doubt not an inevitable, but is certainly a natural, result of the general theory.

Defects of Theory.—The contractual theory, though often maintained, has never been found satisfactory (*Warrender v. Warrender*, 2 Cl. & F. 488; *Mordaunt v. Mordaunt*, L. R. 2 P. & M. 103, 126, judgment of Lord Penzance). The parties to a marriage do not in fact contemplate its rescission, but intend to enter into an agreement for life. The intervention, again, of the State aims rather at the punishment of an offender or the relief of a person injured by the misconduct of another, than at the giving effect to a contract.

2. *Penal Theory.*—Marriage may be regarded as a contract imposing on each of the parties duties in the fulfilment of which the State is so much concerned that the breach thereof exposes the offender to legal penalties. On this view of marriage a divorce is naturally regarded as the penalty inflicted by the State on offences against the marriage relation.

Results of Theory.—The "penal theory" is inconsistent with the view that the right to divorce depends on the terms imposed by the law under which the parties married. The liability to divorce depends, on this view, like the liability to other criminal punishments, on the law of the place where the criminal is residing, or where the offence is committed. Hence, jurisdiction in matters of divorce is, on this view, given by the temporary residence of married persons within a given country, especially if the offence against the marriage relation, e.g., adultery, is committed within the limits of such country. The penal theory of divorce has not on the whole been favoured by

English tribunals (*Mordaunt v. Mordaunt*, L. R. 2 P. & M. 109; *Mordaunt v. Moncreiffe*, L. R. 2 H. L. Sc. 374), but has certainly influenced Scotch courts, and affords the theoretical justification for the freedom with which they have in practice exercised jurisdiction in matters of divorce.

Defects of Theory.—This view has at least two defects. Divorce is not of necessity a penal proceeding. It may, as in countries where it is granted because of the lunacy of one of the parties to the marriage, not be the punishment for any offence, and is, in any case, far more naturally looked upon as a measure of relief to the husband or wife, or to both, than as a punishment to either. If, in the second place, divorce be the punishment for a crime, there is a difficulty in seeing why it should have an extra-territorial effect.

3. *Status Theory.*—Marriage may be regarded as a contract which creates or constitutes a special *status*, viz., the *status* or condition of husband and wife (see pp. 153—155, *ante*). On this view of marriage a divorce is the act by which a State through a public authority dissolves or puts an end to the marriage *status*.

Results of Theory.—First, the claim to divorce has, on this view, no connection with the terms of the marriage contract, for a divorce is not the rescission of an agreement, but the extinction of a *status*, the continuance of which is in the judgment of the State inexpedient, whether on grounds of justice or of policy. Hence, secondly, the fact that the parties were married under a law which did not recognise divorce, affords no reason why the courts of a State, the law of which does recognise divorce, should not dissolve their marriage. Thirdly, jurisdiction to dissolve a marriage naturally belongs on this view exclusively to the tribunals of the country where the parties are domiciled. For this is, according to the doctrine generally prevalent, the country to which the parties belong, and by the law of which their *status* is determined (see judgment of Brett, L.J., *Niboyet v. Niboyet*, 4 P. D. 1, 9). Fourthly, a judgment pronounced by such tribunals has effect everywhere.

It should be noticed that the courts of countries, as, e.g., Italy, whose law makes allegiance and not domicile determine a person's *status*, naturally hold that the right to divorce depends on the law of the country of which the parties to a marriage are citizens, and that jurisdiction in matters of divorce belongs exclusively to the courts of such country.

NOTE VII.—EFFECT OF FOREIGN DIVORCE ON ENGLISH MARRIAGE.

1. *State of Law before 1858.*—Till the year 1858, when the Divorce Act, 20 & 21 Vict. c. 85, came into operation, our courts leaned towards the contractual theory of divorce (see p. 349, *ante*), and on the whole held that the right to divorce depended on the terms of the marriage contract (*Tovey v. Lindsay*, 1 Dow. 117, 131, 140). From this theory, combined with the fact that no means then existed by which

a marriage could be dissolved in due course of law by the English courts (*Wilkinson v. Gibson*, L. R. 4 Eq. 162, 168), arose two doctrines which, on the whole, received the approval of English tribunals. The first doctrine was that no foreign court could, under any circumstances, pronounce a divorce which should be held valid in England of the parties to an English marriage. This view, which was a legitimate inference from the premises on which it was based, may be termed the received doctrine. No decision can be cited which shows that our courts ever, prior to 1858, recognised the right of foreign tribunals to dissolve an English marriage, and several decisions exist which can hardly with fairness be interpreted as consistent with the opinion that an English marriage was, under any circumstances, dissoluble (*Lolley's Case*, 2 Cl. & F. 567; *McCarthy v. De Caiz*, 2 Cl. & F. 568). But though the dogma that an English marriage was indissoluble was the received opinion of the courts, it was one which never obtained decisive judicial sanction. The cases which can be cited in its support do not go further than showing that our courts would not recognise a divorce when the parties to it were not domiciled in the country where the divorce was obtained, and it has even been maintained that the position, that a foreign tribunal can dissolve an English marriage when the parties thereto are domiciled within its jurisdiction, is consistent with all English decisions, though it may not be consistent with the resolution of the judges in *Lolley's case* (*Shaw v. Gould*, L. R. 3 H. L. 55, 85). Though, in short, before 1858 the contractual theory was on the whole predominant, yet it never received full legal recognition, whilst its effects were counteracted by the partial influence of what we have termed the *status* theory of divorce (*Warrender v. Warrender*, 2 Cl. & F. 488; *Conway v. Beazley*, 3 Hagg. Ecc. 639). The second doctrine resulting from the contractual theory was that every marriage celebrated in England was an English marriage, and, therefore, indissoluble by the decree of a foreign tribunal. Hence it was on one occasion decided that the marriage in England of a Dane domiciled in Denmark could not, as far as effects in England went, be dissolved by a Danish divorce. The conclusion, however, that every marriage celebrated in England was an English marriage, and, therefore, indissoluble, was erroneous, even on the contractual theory of divorce. For even if the right to divorce depends on the terms of the marriage contract, these terms are fixed by the law of the country subject to which the marriage is made, which, no doubt, in general is the law of the country where the marriage is celebrated, but may be the law of the country where the husband is domiciled. This was perceived long before the passing of the Divorce Act, and the better, though not the predominant, opinion was, that the marriage in England between parties of whom the husband was domiciled, for example, in Scotland, was not an English but a Scotch marriage, and, therefore, not affected by the rule making English marriages indissoluble (*Warrender v. Warrender*, 2 Cl. & F. 488; *Geils v. Geils*, 3 H. L. C. 280). The state of the law, therefore, prior to 1858, may be thus summed up.

1st, An English marriage was generally held to be indissoluble, though some lawyers inclined to the opinion that when the parties to such a marriage were domiciled in a foreign country they might obtain a divorce which would be held valid in England. 2ndly, The courts often identified a marriage celebrated in England with an English marriage, but the better opinion was that the character of a marriage depended on the domicil of the husband at the time of its celebration.

2. *State of the Law since 1858.*—Our courts have, since 1858 (it is conceived), surrendered the theory that an English marriage cannot be dissolved by a foreign divorce, and admit that where the parties to such a marriage are *bond fide* domiciled in a foreign country the tribunals of that country have jurisdiction to pronounce a divorce which will in general be held valid in England. This view of the present state of the law has been maintained throughout this treatise (see pp. 233—240, *ante*), and, though not conclusively established by any reported case, can be maintained with some confidence on the following grounds:—

First.—The Divorce Act strikes at the root of the theory that no English marriage can be dissolved by a foreign court. For the Act, by providing regular means for divorce, disposes of the contention that an English marriage is a contract entered into on the terms that it shall never be rescinded; and further, being applicable to marriages made before the time when the Act passed, amounts to something like a legislative declaration that the right to divorce does not depend upon the terms of the marriage contract. *Secondly.*—Even independently of the effect of the Divorce Act, English Judges have, in modern times, shewn an inclination to reject the contractual theory of divorce (*Mordaunt v. Mordaunt*, L. R. 2 P. & D. 103, 126, 127; *Shaw v. Gould*, L. R. 3 H. L. 55, 90, 91), and, at the same time, have, on one occasion, at least, distinctly repudiated what we have termed the penal theory (*Mordaunt v. Moncrieffe*, L. R. 2 H. L. Sc. 374). Add to this, that though no reported case establishes the doctrine that a foreign divorce can dissolve an English marriage, yet strong judicial dicta may be cited in favour of the view that questions of divorce have reference to *status*, and ought, therefore, to be decided wholly by the courts of the country where the parties are domiciled (*Wilson v. Wilson*, L. R. 2 P. & D. 435, 442; *Niboyet v. Niboyet*, 4 P. D. 1, 19; *Shaw v. Attorney-General*, L. R. 2 P. & D. 156, 161, 162, *Shaw v. Gould*, L. R. 3 H. L. 55, 85, and see pp. 234—237, *ante*). But this view is at bottom absolutely inconsistent with the maintenance of the opinion that no foreign decree of divorce can dissolve an English marriage. *Thirdly.*—The Divorce Court has pressed to the utmost the claim to jurisdiction over all persons domiciled in England (*Wilson v. Wilson*, L. R. 2 P. & D. 435, and see pp. 228—233, *ante*), and in the absence of decisions to the contrary, it may safely be assumed that our courts will in general concede to foreign tribunals, the same jurisdiction in respect of English marriages which our courts claim for themselves in respect of foreign marriages.

The present state of the law is, therefore (it is conceived), that a foreign divorce, if pronounced by a divorce court of the country where

the parties are domiciled, will in general dissolve an English marriage, and be held valid in England.

3. *Jurisdiction of Scotch courts to dissolve an English marriage?*—The Scotch courts adopting in the main the “penal” theory of divorce (see pp. 350—351, *ante*, *Utterton v. Tewah*, Ferg. Div. Cases 23) have never admitted that the fact of a marriage being celebrated in England, or of its being in strictness an English marriage, deprives them of jurisdiction to grant a divorce (2 *Fraser, Treatise on Husband and Wife* (2nd ed.), pp. 1286—1294; *Warrender v. Warrender*, 2 Cl. & F. 488). They have further maintained that jurisdiction is given by (i) the commission in Scotland of a divorce offence (*locus delicti*) and the personal citation of the defendant (2 *Fraser* (2nd ed.), 1288, 1289); or (ii) the residence of the parties, (*i.e.*, in effect of the husband) in Scotland for a period of forty days (see *Ringer v. Churchill*, 2 D. 307; *Jack v. Jack*, 24 D. 467); or (iii) the *bond fide* domicile of the parties in Scotland. The English courts have never conceded the validity of the claims put forward by Scotch tribunals. They shewed at one time, as already pointed out, (pp. 352, 353, *ante*), a disposition to maintain that every marriage celebrated in England was an English marriage, and that a Scotch divorce could not dissolve an English marriage as regards its effect in England (*Lolley's Case*, 2 Cl. & F. 567), and have since no less than before the passing of the Divorce Act (*Shaw v. Gould*, L. R. 3 H. L. 55) strenuously maintained that no decree of a Scotch court can divorce the parties to an English marriage, unless they are domiciled in Scotland at the time of the divorce. This difference of view as to jurisdiction in divorce has led to much controversy and some practical inconvenience. The important question, however, whether an English marriage can under any circumstances be dissolved as regards its effects in England by a Scotch divorce has never been raised in such a form as to receive absolute decision. For *Lolley's Case* (2 Cl. & F. 567) only decides that English courts will not recognise the validity of a divorce pronounced by the court of a country where the parties are not domiciled, whilst *Warrender v. Warrender* (2 Cl. & F. 488) only decides a matter of Scotch law, *viz.*, that the Scotch courts claim jurisdiction to divorce persons who though married in England are at the time of the divorce domiciled in Scotland. But though the answer to the enquiry raised cannot be treated as decisively determined by authority, the following considerations suggest what the answer ought to be, and point to the conclusion that the opinions entertained by the Scotch and the English tribunals respectively admit of reconciliation.

First.—The Scotch courts, as represented at any rate by the House of Lords, would appear to have surrendered the claim to dissolve the marriage of persons not domiciled in Scotland, or at least to look with great doubt on the doctrine that either the *locus delicti* or residence for forty days gives jurisdiction in matters of divorce. (*Pitt v. Pitt*, 4 Macq. 627; *Jack v. Jack*, 24 D. 467; *Ringer v. Churchill*, 2 D. 307.) It is, however, perfectly clear that the Scotch courts, even if they surrender other grounds of jurisdiction, claim jurisdiction to dissolve

the marriage of any persons domiciled in Scotland. (*Warrender v. Warrender*, 2 Cl. & F. 488.)

Secondly.—English courts have, as already pointed out, (see pp. 234, 237, 352, 353, *ante*), all but ceased to maintain that a marriage celebrated in England is of necessity an English marriage, and have shewn a marked inclination to concede that even an English marriage may be dissolved by the tribunals of any country where the parties are domiciled at the time of divorce.

It therefore appears to follow that a Scotch divorce will in general be held valid in England if the parties to the marriage are, when divorced, domiciled in Scotland, that such a divorce will not be held valid if the parties are not domiciled in Scotland, and that the controversy between the English and the Scotch courts may be reconciled by the admission on each side that domicile is the true criterion of jurisdiction in matters of divorce.

NOTE VIII.—EXTRA-TERRITORIAL EFFECT OF
DISCHARGE IN BANKRUPTCY.

RULE i.—*A discharge under the bankruptcy law of any country from any debt or liability is a discharge, in the courts of such country, from such debt or liability wherever contracted.* (*Armani v. Castrique*, 14 L. J. (Ex.) 36, 38.)

X., a Frenchman, becomes indebted in France to A., also a Frenchman. X. becomes bankrupt in England, and obtains his discharge. A. cannot maintain an action in England for the debt against X. (*Armani v. Castrique*, 14 L. J. (Ex.) 36; *Ellis v. McHenry*, L. R. 6 C. P. 228.)

RULE ii.—*A discharge from a debt or liability under the bankruptcy law of the country in which the debt or liability has arisen is a discharge from such debt or liability in the courts of every country* (*Ellis v. McHenry*, L. R. 6 C. P. 228, 234, judgment of Bovill, C.J.; *Bartley v. Hodges*, 1 B. & S. 375, 30 L. J. (Q.B.) 352; *Phillips v. Eyre*, L. R. 6 Q. B. 1, 28; *Story*, s. 340).

X. incurs a debt to A. in Victoria for goods there sold and delivered by A. to X. Afterwards X. obtains a discharge under the Victorian insolvent law. A. cannot sue X. for the debt in an English court (*Gardiner v. Houghton*, 2 B. & S. 743. *Quellin v. Moisson*, 1 Knapp, P. C. 265; *Smith v. Buchanan*, 1 East, 6).

X. in Baltimore draws a bill on M. in London payable to A. M., the drawee, refuses to accept the bill. X. becomes bankrupt in America, and obtains a discharge under the bankruptcy laws of the United States. A. cannot sue X. in an English court for the amount of the bill. (*Potter v. Brown*, 5 East, 124.)

RULE iii.—*Subject to the apparent exception hereinafter men-*

tioned, the discharge from a debt or liability under the bankruptcy law of a country where such debt or liability did not arise is not a discharge in the courts of any other country (*Ellis v. McHenry*, L. R. 6 C. P. 228, 234; *Smith v. Buchanan*, 1 East, 6; *Lewis v. Owen*, 4 B. & Ald. 654; *Phillips v. Allan*, 8 B. & C. 477; *Bartley v. Hodges*, 1 B. & S. 375, 30 L. J. (Q. B.) 352).

A., in England, draws a bill of exchange against X. in England. X. accepts the bill which he does not pay in due course. X. afterwards becomes bankrupt in Victoria, and obtains a discharge there under a Colonial insolvency Act. A. can in spite of the discharge under the Victorian Statute maintain an action in England against X. for the amount of the bill (*Bartley v. Hodges*, 1 B. & S. 375, 30 L. J. (Q. B.) 352).

X. buys goods in England of A. X. afterwards obtains at New York a discharge under the New York bankruptcy law. The discharge is no answer to an action by A. in an English court against X. for the price of the goods (*Smith v. Buchanan*, 1 East, 6).

APPARENT EXCEPTION.—A discharge from a debt or liability under a bankruptcy Act of the Imperial Parliament is a discharge from such debt or liability in the courts of any country forming part of the British dominions (*Ellis v. McHenry*, L. R. 6 C. P. 228).

X. incurs a debt to A. in Victoria. X. afterwards makes an arrangement with his creditors by a composition deed under an English bankruptcy Act. A. brings an action in the Victorian courts for the amount of the debt. The arrangement under the English composition deed is an answer to the action. (*Ellis v. McHenry*, L. R. 6 C. P. 228.)

X. incurs a debt to A. in England and to B. in Scotland. X. then obtains a discharge under the Irish Bankruptcy Act. A. sues X. in an English court for the English debt, and B. sues him, also in an English court, for the Scotch debt. The discharge is an answer to both actions. (*Fergusson v. Spencer*, 2 Scott, N. R. 229; *Sidaway v. Hay*, 3 B. & C. 12.)

As to this exception two points deserve notice. *First*.—The exception is only an apparent one. For the purposes of the Imperial bankruptcy Acts the British dominions form one country or law district. Hence the fact that a discharge under an English bankruptcy Act is in a Victorian court a bar to a debt contracted in Victoria ought to be considered in strictness rather an application of Rule i., p. 355, *ante*, than a real exception to Rule iii., p. 355, *ante*. *Secondly*.—Rule iii. combined with this exception, leads to the result that a discharge under an English bankruptcy Act is in Victoria a discharge from a debt contracted in Victoria or elsewhere, whilst a discharge under a Victorian bankruptcy Act is not in England a discharge from a debt or liability not arising in Victoria. That this is so is a consequence of the legal relation between the United Kingdom and the colonies. A Victorian court is subject to two legislatures, viz., the Imperial Parliament and the Victorian legislature. A discharge under an Imperial bankruptcy Act is a command to all courts under the control of the Imperial Parliament, *i.e.*, to all courts throughout the British dominions, to treat

the bankrupt as discharged from liability. This command binds the Victorian courts, and they therefore recognise a discharge under an Imperial Act, even in respect of Victorian debts. A discharge under a Victorian bankruptcy Act is a command to all courts under the control of the Victorian legislature to treat the bankrupt as discharged from liability. This command also binds the Victorian courts. They therefore recognise a discharge under a Victorian Act in respect both of English and of Victorian debts. The commands, however, of the Victorian legislature do not bind English courts. Our tribunals, therefore, give the same effect to a discharge under a Victorian Act which they give to a discharge under the law of France or America. They regard it, that is to say, as freeing the bankrupt from liability for those debts only which have arisen in the country—Victoria—under the law of which he has obtained his discharge.

NOTE IX.—FOREIGN WILLS ACTS.

24—25 VICT., c. 114.

An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects.

6th August, 1861.

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered by reason of any subsequent change of domicile of the person making the same.

4. Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act.

5. This Act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this Act.

24—25 VICT. c. 121.

An Act to amend the Law in relation to the Wills and Domicil of British Subjects dying whilst resident abroad, and of Foreign Subjects dying whilst resident within her Majesty's Dominions.

6th August, 1861.

Whereas by reason of the present Law of Domicil the wills of British subjects dying whilst resident abroad are often defeated, and their personal property administered contrary to their expectations and belief; and it is desirable to amend such law, but the same cannot be effectually done without the consent and concurrence of foreign states: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows:

1. Whenever her Majesty shall by convention with any foreign state agree that provisions to the effect of the enactments herein contained shall be applicable to the subjects of her Majesty and of such foreign state respectively, it shall be lawful for her Majesty by any Order in Council to direct, and it is hereby enacted, that from and after the publication of such order in the *London Gazette* no British subject resident at the time of his or her death in the foreign country named in such order, shall be deemed under any circumstances to have acquired a domicile in such country unless such British subject shall have been resident in such country for one year immediately preceding his or her decease, and shall also have made and deposited in a public office of such foreign country (such office to be named in the Order in Council) a declaration in writing of his or her intention to become domiciled in such foreign country; and every British subject dying resident in such foreign country, but without having so resided and made such declaration as aforesaid, shall be deemed for all purposes of testate or intestate succession as to moveables to

retain the domicile he or she possessed at the time of his or her going to reside in such foreign country as aforesaid.

2. After any such convention as aforesaid shall have been entered into by her Majesty with any foreign state it shall be lawful for her Majesty by Order in Council to direct, and from and after the publication of such order in the *London Gazette* it shall be and is hereby enacted, that no subject of any such foreign country who at the time of his or her death shall be resident in any part of Great Britain or Ireland shall be deemed under any circumstances to have acquired a domicile therein, unless such foreign subject shall have been resident within Great Britain or Ireland for one year immediately preceding his or her decease, and shall also have signed and deposited with her Majesty's Secretary of State for the Home Department, a declaration in writing of his or her desire to become and be domiciled in England, Scotland, or Ireland, and that the law of the place of such domicile shall regulate his or her moveable succession.

3. This Act shall not apply to any foreigners who may have obtained letters of naturalisation in any part of her Majesty's dominions.

4. Whenever a convention shall be made between her Majesty and any foreign state, whereby her Majesty's consuls or vice-consuls in such foreign state shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty by Order in Council to direct, and from and after the publication of such order in the *London Gazette* it shall be and is hereby enacted, that whenever any subject of such foreign state shall die within the dominions of her Majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul, or consular agent of such foreign state within that part of her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice-consul, or consular agent shall immediately apply for and shall be entitled to obtain from the proper court letters of administration of the effects of such deceased person, limited in such manner and for such time as to such court shall seem fit.

NOTE X.—RECENT CASES ON DOMICIL.

Three recent cases call for particular notice.

1. *Sottomayor v. De Barros*, 2 P. D. 81, 3 P. D. 1.—By the law of Portugal a marriage between first cousins is illegal as being incestuous,

but may be celebrated under a Papal dispensation. D. and M., Portuguese subjects, domiciled in Portugal, and first cousins to each other, came to reside in England in 1858, and in 1866 went through a form of marriage before the Registrar of the District of the City of London. In 1873 they returned to Portugal. Their domicile had throughout continued to be Portuguese. In 1874, M., the woman, petitioned the Divorce Court to declare her marriage with D. null and void. The court refused to pronounce the marriage void, holding that the court of the country where a marriage is contracted is not bound to recognise the incapacities affixed by the law of the domicile of the parties to a contract of marriage, if such incapacities do not exist according to the *lex loci contractus*, and ought not to pronounce a marriage otherwise valid to be null and void by reason of such incapacities (2 P. D. 81). On appeal, the Court of Appeal reversed the decision of the court below, and held that the parties being by the law of their domicile under a personal disability to contract marriage with each other, their marriage ought to be declared null and void (3 P. D. 1). This decision of the Court of Appeal may, till overruled, be taken to decide the following points, viz., first, that capacity to contract marriage, and perhaps capacity to contract generally, is to be determined by reference to the law of the contractor's domicile, and not by reference to the *lex loci contractus*; secondly, that *status* or personal capacity is dependent upon the law of a person's domicile; thirdly, that our courts have jurisdiction to determine the *validity* of a marriage contracted in England, even though the parties to it are not and never have been domiciled in England. (*Simonin v. Mallac*, 2 Sw. & Tr. 67, 29 L. J. (P. & M.) 97, see Rule 48, p. 243, *ante*.) This case is, as to the main points involved, on the whole in conformity with the doctrines of jurists, such as Savigny, but is hard to reconcile with earlier cases, such as *Male v. Roberts*, 3 Esp. N. R. 163; *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54; *Scrimshire v. Scrimshire*, *Ibid.*, 395. There is, however, some logical difficulty in reconciling the claim of the court of the country where the parties are not domiciled to pronounce on the validity of a marriage with the view, which lies at the bottom of the decision, that *status* depends on the law of a person's domicile.

2. *Niboyet v. Niboyet*, 3 P. D. 52, 4 P. D. 1.—D., a French subject, married M., a British subject, at Gibraltar in 1856. In 1862, D. was appointed French Vice-Consul in England, where he resided till 1869. From 1869 to 1875 D. held Consular appointments under the French Government out of England. In 1875, D. was appointed Consul in England, and resided in England, in discharge of his Consular duties, till the commencement of the suit for divorce in 1876. On 23rd October, 1876, M. petitioned for dissolution of marriage, alleging adultery, coupled with desertion. It was held by the judge of the Divorce Court that the court had no jurisdiction to grant a divorce (3 P. D. 52). On appeal the Court of Appeal held (Brett, L.J., dissenting), that the court had jurisdiction to grant a divorce (4 P. D. 1).

This decision must, until overruled, be taken as certainly deciding, that under certain circumstances residence short of domicile

gives jurisdiction to the Divorce Court in matters of divorce, and, though not necessarily deciding this point, may be cited as shewing, that the jurisdiction of the court in matters of divorce does not in any way depend upon domicile. "I find myself," says James, L.J., "unable to arrive at the conclusion that the domicile of the complaining party ought to determine the existence of the limits of the jurisdiction given by the English statute to the English court. The only limitation which I can find is the limitation of the jurisdiction to those matters which come under the category of matrimonial matters in England, to every one of which the English law, with all its consequences, as far as England is concerned, must be applied" (4 P. D. 9). The doctrine here laid down is, no doubt, propounded by a judge of the highest eminence, but it is opposed to the judgments both of Sir Robert Phillimore and of Brett, L.J., and suggests the following criticisms:—*First*.—The Court of Appeal, while rejecting domicile as a criterion of jurisdiction, has not clearly pointed out what is the criterion by which the existence of jurisdiction is to be determined. *Secondly*.—If domicile be abandoned as a test of jurisdiction the Divorce Act will in many cases be extended to parties whose home is in Ireland, a result which it is difficult to believe was contemplated by the legislature. *Thirdly*.—The doctrine of the Court of Appeal is opposed to the dicta of weighty authorities (see the expressions of Lord Penzance in *Wilson v. Wilson*, L. R. 2 P. & D. 435, and of Lord Westbury in *Shaw v. Gould*, L. R. 3 H. L. 55, 85), as well as to the opinions of jurists (2 *Bishop, Marriage and Divorce*, ss. 132—198; *Story*, ss. 228—230c; *Savigny*, s. 376, p. 248; *Bar*, s. 92; and compare *Fiore*, s. 131), and is hard to reconcile with some decided cases (*Yelverton v. Yelverton*, 1 Sw. & Tr. 574; and see *Duggan v. Duggan*, decided in the Supreme Court of Victoria, 8th October, 1877, reported 64 *L. Times*, p. 152). *Fourthly*.—The actual decision in *Niboyet v. Niboyet* may be upheld without adopting all the reasoning by which it is supported in the judgments given by the majority of the court. The wife alleged desertion, and it has often been suggested that it is reasonable in such a case not to press the fiction that a wife is domiciled in the same country as her husband to such an extent as to deprive her of the right of petitioning for divorce. The decision, in short, is one which may more easily be justified by the exceptional circumstances of the case than on the general principles on which it is supposed to rest.

3. *In re Cigala's Settlement Trusts*, 7 Ch. D. 351.—In 1838 D., an Italian, domiciled in Italy, married an English lady, who, under an English marriage settlement, assigned French *rentes* and shares in the Bank of France to trustees, upon trust, after the death of the husband and wife, for the children of the marriage. D. and his wife continued domiciled in Italy. In 1877 D., who survived his wife, died, leaving two children, A. and B., both domiciled Italians. It was held that succession duty was payable by A. and B. on the property coming to them under the settlement.

This case is very remarkable, as going a great way towards invalidat-

ing the rule that liability to succession duty depends on domicile. The successors were domiciled Italians. The property was, in fact, situated abroad. The rule, therefore, that this case appears to establish is, that any property whatever, taken under an English settlement, is liable to duty. The decision is rendered somewhat unsatisfactory, not only from its going beyond any preceding judgment in cutting down the principle that liability to succession duty depends upon domicile, but also from the fact, that, as far as appears from the report of the case, a good deal of the argument turned upon the quite irrelevant point of A. and B., the successors, being foreigners, *i.e.*, persons owing a foreign allegiance.

NOTE XI.—IS DOMICIL OR ALLEGIANCE THE PROPER TEST OF CIVIL RIGHTS?

1. *The Two Doctrines.*—English courts, in common with the older school of jurists, of whom Story and Savigny are representatives, hold that a person's civil rights and the legal effect of his conduct are in many cases to be determined by the law of his domicile. The tribunals of foreign countries, and notably of Italy, in common with the modern school of writers, of whom Bar and Fiore are representatives, have adopted the doctrine that a person's civil rights, and the legal effect of his conduct, are, in the cases to which our courts apply the law of his domicile, to be determined, not by the law of his domicile but by the law of the nation or state to which he belongs, by citizenship or allegiance. This view has now been formally embodied in the Italian Code, which enacts that "the *status* and the capacity of persons and family relations are regulated "by the law of the nation to which they belong." (*Lo stato e la capacità delle persone ed i rapporti di famiglia sono regolati dalla legge della nazione a cui esse appartengono. Codice Civile del Regno d'Italia, Art. 6. See also Art. 8; Fiore, s. 45.*) The difference between the two doctrines may be thus summed up. According to English law, a person belongs, for civil purposes, to the country where he has his home or domicile. His civil rights, therefore, are determined by reference to the law of his domicile. According to Italian law, a person belongs to the country or state of which he is a member, or, in other words, to whose sovereign he owes allegiance. His civil rights, therefore, are determined by reference to the law of the State of which he is a citizen. The English doctrine bases civil rights upon domicile; the Italian doctrine bases them upon citizenship or allegiance. The reader should notice that what is here termed for convenience the English doctrine still prevails in many other countries besides England, and has, till recently, commanded universal assent, and that what is here for convenience termed the Italian doctrine, as being, partially at any rate, adopted into the Italian Code, would seem to be, to a certain extent, the doctrine of French law, and certainly has obtained recognition out of Italy.

2. *Practical Difference of Results.*—As most persons have their domicile in the country of which they are citizens, it may constantly happen that the English and the Italian doctrine lead in practice to the same results. An Englishman domiciled in England and not naturalised in Italy dies intestate at Rome. Both the English and the Italian courts hold that succession to his moveables is governed by the law of England. Our courts come to this conclusion because D. is domiciled in England. The Italian courts come to the same conclusion because D. is an English citizen. But this coincidence in the results of the two doctrines is purely accidental. D., an Italian citizen who is domiciled in England, dies intestate at Rome. English courts hold that succession to his moveable property is governed by the law of England as being D.'s *lex domicilii*, and will, as far as lies in their power, give effect to this view. Italian courts hold that succession to D.'s moveable property is governed by the law of Italy, as being the law of the nation to which D. belongs, and will, as far as lies in their power, give effect to this view. D.'s moveables in England will, therefore, be distributed according to the Statute of Distributions. D.'s moveables in Italy will be dealt with in accordance with the Italian Code (*Codice Civile del Regno d'Italia*, Art. 8). A further result will ensue, not intended by the law of either country, viz., that the succession to D.'s moveables will, instead of being determined by one law, be governed in part by the law of England, in part by the law of Italy.

3. *Merits and Defects of each Doctrine.*—It will probably be admitted that the existence of two different theories with regard to the test of civil rights is an evil. It is, therefore, worth while to state shortly the arguments which may be used both in favour of and against the English and the Italian doctrine respectively.

(i). *English Doctrine.*—The arguments in favour of making domicile the test of civil rights are in the main three. *First.*—The rule that a person's rights are to be regulated by the law of his domicile has the great recommendation that it is on the whole the received rule, and that in all questions arising from what is called the conflict of laws it is far better that a tolerable rule once fixed should be generally adhered to than that an improved rule should be introduced at the certain cost of causing uncertainty and confusion. The force, however, of this consideration is much diminished by the countenance which the rival theory has already obtained in the courts and legislation of different countries. *Secondly.*—The law of a person's domicile is in many cases the rule which can most fairly be applied to determining the legal effect of his conduct. Thus an Italian, who has lived for years in England has probably, in fact, carried on his business with reference to English law, though from motives of patriotism or convenience he may have retained his Italian citizenship. *Thirdly.*—Domicile can be applied as a test of civil rights to all cases whatever, whereas allegiance is a criterion which fails when applied to the subjects of a state, such as the British Empire or the United States, consisting of more than one country. (See pp. 31—33, *ante*.) If, for example, a person domiciled in Scotland dies in Italy, it is difficult to see how succession to his moveables can be

determined by reference to allegiance or nationality, or indeed without, in some way or other, introducing the question of his domicile. Italian writers appear to be aware of this difficulty in the way of making a person's rights depend on his allegiance (*Fiore*, s. 42), but probably do not, in fact, realise the extent to which the laws of different countries forming part of one state differ from each other. It is at any rate worth remark that the attempt made by English courts to identify change of domicile with change of allegiance (*Moorhouse v. Lord*, 10 H. L. C. 272) ended in failure (*Udny v. Udny*, L. R. 1 Sc. App. 441; *Douglas v. Douglas*, L. R. 12 Eq. 617; see pp. 81—83, *ante*), and failed (it is conceived) in part from the impossibility of determining by reference to allegiance whether a person was subject to the law of one part of the British Empire or of another. The one argument likely to have weight with English lawyers against basing civil rights on the law of domicile is the great evil of making matters of consequence depend upon a point so difficult to ascertain and so uncertain in itself as a person's intention with regard to residence. The constant result of so doing is to make rights of property, questions of legitimacy, it may be even the validity of a marriage, depend upon what is little more than a conjecture as to the intention of a person who, to speak plainly, had very possibly no definite intention at all as to the place of his permanent residence. D., for example, is a Frenchman, who has lived for years in England. He has lands and houses, ties and connections in each country. He dies when on a visit to Paris. Succession to his moveables is determined in the English courts by the law of his domicile. The question at once arises, Was his domicile French or English? The point for decision is, What was his intention as to permanent residence? The fact may be that no sufficient evidence exists to enable a sensible man to come to a conclusion one way or the other. The court, however, must balance one trifle against another, and ultimately comes to a decision which cannot from its nature be much more satisfactory than if it had turned upon the cast of a die. Add to this, that owing to the rule that a person is assumed to have, in the absence of any other home, his domicile of origin (see pp. 86—96, *ante*), it may well happen that A.'s right to succeed to D.'s property may depend not upon D.'s intention as to residence, but upon the intention of D.'s father at the time of D.'s birth, *i.e.*, upon the intention entertained sixty or seventy years ago by a man long since dead, the facts of whose life are imperfectly known. Take, for instance, the case we have already imagined, varying it by the supposition that D. dies without a real home in any country. Succession to D.'s moveables is then regulated by the law of D.'s domicile at the time of his birth. It is proved that D. was born in 1791, when his father, a Frenchman, was living in England. The question whether D.'s domicile of origin is French or English, and whether, therefore, succession to his moveables is regulated by French or by English law, will turn on the answer to the enquiry whether D.'s father did or did not in 1791 intend to reside permanently in England. The very statement of this case, which is by no means an impossible

one, brings into light the weak side of the law of domicile as a basis of rights.

(ii). *Italian Doctrine*.—The case in favour of referring civil rights to allegiance or nationality is strong just where that in favour of testing them by domicile is weak. Allegiance affords a clear, definite test which is easily applied. An Italian lives for years in England, and dies intestate in London. To ascertain his domicile may be a matter of the highest difficulty. To ascertain whether he did or did not become naturalised in England is, in general, a matter of no difficulty whatever. For it may safely be assumed that an Italian remains a subject of the Italian Kingdom, unless it can be shown, by the proper documentary evidence, that he became by naturalization a British subject. Add to this that since any one can now easily change his allegiance, it is not unfair to assume that a person who does not do so means to belong to and to be subject to the law of his native country. On the other hand the test of allegiance fails, as already pointed out, just where the criterion of domicile is of value. For since all the subjects of one state owe allegiance to the same sovereign, it is impossible to determine by the criterion of allegiance or nationality to which of two countries forming part of the same state, *e.g.*, England or Scotland, a given person belongs.

The general conclusion from the arguments on both sides is that allegiance or nationality is, where it is applicable, a sounder criterion of civil rights than domicile, but that there are cases in which a person's rights cannot be determined simply by reference to his nationality or allegiance, and that in such cases, assuming that one test only is to be applied, no better criterion than domicile can be found. Whether, by the combined action of legislation and treaties, arrangements might not be made under which a person's rights might, in the courts of all countries, be always referred to his national law, or, in other words, be regulated by his allegiance, is a question rather of statesmanship than of law.

NOTE XII.—DOMICIL UNDER INDIAN SUCCESSION ACT, 1865.

The Indian Succession Act, 1865, contains a series of rules as to domicile which, with some amendments, are intended to embody the principles of English law on the subject. They are reprinted here, and may with advantage be compared with the Rules 1—14, pp. 42—112, *ante*, and Rules 66—71, pp. 291—313, *ante*.

The Indian Succession Act, 1865.

ACT No. X. OF 1865.

* * * * *

Part I.—Preliminary.

1. This Act may be cited as "The Indian Succession Act, 1865."
2. Except as provided by this Act or by any other law for the

time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of intestate or testamentary succession.

3. In this Act, unless there be something repugnant in the subject or context . . .

“Immoveable property” includes land, incorporeal tenements and things attached to the earth, or permanently fastened to anything which is attached to the earth.

“Moveable property” means property of every description except immoveable property.

* * * *

Part II.—Of Domicil.

5. Succession to the immoveable property in British India of a person deceased is regulated by the law of British India, wherever he may have had his domicil at the time of his death. Succession to the moveable property of a person deceased is regulated by the law of the country in which he had his domicil at the time of his death.

Illustrations.—(a). *A., having his domicil in British India, dies in France, leaving moveable property in France, moveable property in England, and property, both moveable and immoveable, in British India. The succession to the whole is regulated by the law of British India.*

(b). *A., an Englishman having his domicil in France, dies in British India, and leaves property both moveable and immoveable, in British India. The succession to the moveable property is regulated by the rules which govern, in France, the succession to the moveable property of an Englishman dying domiciled in France, and the succession to the immoveable property is regulated by the law of British India.*

6. A person can only have one domicil for the purpose of succession to his moveable property.

7. The domicil of origin of every person of legitimate birth is in the country in which at the time of his birth his father was domiciled; or, if he is a posthumous child, in the country in which his father was domiciled at the time of the father's death.

Illustration.—*At the time of the birth of A. his father was domiciled in England. A.'s domicil of origin is in England, whatever may be the country in which he was born.*

8. The domicil of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.

9. The domicil of origin prevails until a new domicil has been acquired.

10. A man acquires a new domicil by taking up his fixed habitation in a country which is not that of his domicil of origin.

Explanation.—A man is not to be considered as having taken up his fixed habitation in British India merely by reason of his residing there in her Majesty's civil or military service, or in the exercise of any profession or calling.

Illustrations.—(a). *A., whose domicil of origin is in England, proceeds to British India, where he settles as a barrister or a merchant,*

intending to reside there during the remainder of his life. His domicil is now in British India.

(b). A., whose domicil is in England, goes to Austria, and enters the Austrian service, intending to remain in that service. A. has acquired a domicil in Austria.

(c). A., whose domicil of origin is in France, comes to reside in British India under an engagement with the British Indian Government for a certain number of years. It is his intention to return to France at the end of that period. He does not acquire a domicil in British India.

(d). A., whose domicil is in England, goes to reside in British India for the purpose of winding up the affairs of a partnership which has been dissolved, and with the intention of returning to England as soon as that purpose is accomplished. He does not, by such residence, acquire a domicil in British India, however long the residence may last.

(e). A., having gone to reside in British India under the circumstances mentioned in the last preceding illustration, afterwards alters his intention, and takes up his fixed habitation in British India. A. has acquired a domicil in British India.

(f). A., whose domicil is in the French settlement of Chandernagore, is compelled, by political events, to take refuge in Calcutta, and resides in Calcutta for many years in the hope of such political changes as may enable him to return with safety to Chandernagore. He does not by such residence acquire a domicil in British India.

(g). A. having come to Calcutta under the circumstances stated in the last preceding illustration, continues to reside there after such political changes have occurred as would enable him to return with safety to Chandernagore, and he intends that his residence in Calcutta shall be permanent. A. has acquired a domicil in British India.

11. Any person may acquire a domicil in British India by making and depositing in some office in British India (to be fixed by the local government), a declaration in writing, under his hand, of his desire to acquire such domicil, provided that he shall have been resident in British India for one year immediately preceding the time of his making such declaration.

12. A person who is appointed by the Government of one country to be its ambassador, consul or other representative in another country, does not acquire a domicil in the latter country by reason only of residing there in pursuance of his appointment; nor does any other person acquire such domicil by reason only of residing with him as part of his family or as a servant.

13. A new domicil continues until the former domicil has been resumed, or another has been acquired.

14. The domicil of a minor follows the domicil of the parent from whom he derived his domicil of origin.

Exception.—The domicil of a minor does not change with that of his parent, if the minor is married, or holds an office or employment in the service of her Majesty, or has set up, with the consent of the parent, in any distinct business.

368 NOTE XII.—DOMICIL UNDER INDIAN ACT, 1865.

15. By marriage a woman acquires the domicile of her husband, if she had not the same domicile before.

16. The wife's domicile during the marriage follows the domicile of her husband.

Exception.—The wife's domicile no longer follows that of her husband if they be separated by the sentence of a competent court, or if the husband is undergoing a sentence of transportation.

17. Except in the cases above provided for, a person cannot, during minority, acquire a new domicile.

18. An insane person cannot acquire a new domicile in any other way than by his domicile following the domicile of another person.

19. If a man dies leaving moveable property in British India, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of British India.

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